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THE
CRIMINAL LAW OF INDIA.

BY

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PREFACE.

THIS work is entirely different, both in arrangement and scope, from my Commentary on the Penal Code, which it will supersede. It is divided into two parts. The first contains the Indian Penal Code, with some notes, which seemed most suitably placed in connection with the text. References are appended to every section which is discussed in Part II., so as to enable the reader to find at once everything that has been said about it. In Part II. I have attempted to offer a methodized view of the Criminal Law at present administered in India, so far as it is based on the Penal Code, the Criminal Procedure Code, and the Evidence Act. I have not touched upon Local and Special Acts. I have only dealt with Procedure so far as it affects the actual trial and matters incident thereto.

It will be observed that I have made a more extensive use of the decisions of the Civil Courts than is usual in works on Criminal Law. This seems to me necessarily to follow from a perception of the fact that Criminal Law is itself only a branch of the general law of the country. With the exception of purely statutory offences, nothing is a crime which has not previously been a wrong, and in most cases, before the accused can be convicted of a crime, it is necessary to show that he has committed an act which would be treated as illegal by a Civil Court. In England,

where knowledge is highly specialized, and where every practitioner has ready access to extensive libraries, it may be sufficient to cite decisions of the Criminal Courts. In India, where, outside of the Presidency Towns, law books are unattainable, both Advocates and Judges will, I think, be assisted by being supplied with information of a more wide and ample character.

It may, perhaps, be charged against me, that I have adopted a line of discussion, which has frequently been reprobated by the Judicial Committee—that of attempting to explain the Code by reference to English authorities. My chief answer must be that, in doing so, I am following the example of the Indian Courts, as will be seen in every volume of their reports. It is quite certain that whenever an appeal is preferred to the High Courts, if any question of law is not covered by Indian authority, it will be discussed with reference to English text-books and decisions. I have attempted to supply the local Bar and Bench with the authorities by which their proceedings will undoubtedly be tested on appeal. In most cases, however, the objection is itself inapplicable. The Penal Code supplies a series of clear and definite rules, which are to be found in numbered sections, instead of having to be hunted for through a library of law books. The application of the rules depends upon the facts of each case, which shade away by infinite degrees from absolute certainty to the slightest suspicion. In such cases the recorded experience of centuries of English experts must be of the highest importance.

I have to acknowledge my continual obligation to the great works of the late Sir James Stephen, which can never be overlooked by any one who is interested in Criminal Law. I have also constantly borrowed from the Code of English Criminal Law, drawn up and reported on in 1879. The first draft of this Code was prepared by Sir James Stephen under instructions from the Government. It was

introduced as a Bill in the House of Commons by the Attorney-General, and was at once referred to a Committee, consisting of Lord Blackburn, Lord Justice Lush, Mr. Justice Barry (an eminent Irish judge), and Sir James Stephen. By them it was minutely examined, line by line, and again issued with their emendations, and with a report, which was written by Sir James Stephen. There the matter ended as regards Parliament; but although the draft Code will probably never become law, it and the Report upon it will remain as an authentic record of what the English Criminal Law was believed to be by the greatest criminal lawyers of the day.

As regards matters of Procedure, I have availed myself largely of the labours of Messrs. Agnew and Henderson and Mr. Sohoni, in their works on the Criminal Procedure Code, and of Mr. Stokes, in his great collection of the Codes of India. To them I tender my grateful thanks.

JOHN D. MAYNE.

1, Crown Office Row,
Temple,
May, 1896.

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PART I.

THE INDIAN PENAL CODE

ACT No. XLV. OF 1860.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(*Received the assent of the Governor-General on the 6th October*, 1860.)

CHAPTER I.

Preamble.

WHEREAS it is expedient to provide a General Penal Code for British India; It is enacted as follows:—

Title and extent of operation of the Code.

1. This Act shall be called THE INDIAN PENAL CODE, and shall take effect on and from the 1st day of May, 1861, throughout the whole of the Territories which are or may become vested in Her Majesty by the Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales Island, Singapore, and Malacca.

Commentary.

Now extended to that Settlement by Act V. of 1867.

By Statute 28 Vict., c. 17, s. 4, the Governor-General in Council is empowered to allot any part of British India to such Presidency or Lieutenant-Governorship as he may deem expedient. The Penal Code, by its second section, and the Criminal Procedure Code, by its fifth section, are universal in their application to all parts of British India, unless and until, in the case of the districts which are styled "Scheduled

Districts" in Act XIV. of 1874, the local government to which any such district is annexed should, with the previous sanction of the Governor-General in Council, declare that they, or either of them, are not in force in such district. It will be observed that neither of these Codes are referred to in the Law and Local Extent Act XV. of 1874. See, as to Perim, Reg. *v.* Mangul Tekchand, 10 Bom. 258; as to the Laccadive Islands, Reg. *v.* Cheria Koya, 13 Mad. 253.

Punishment of offences committed within the said Territories.

2. Every person shall be liable to punishment under this Code and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said Territories on or after the said 1st day of May, 1861.

Commentary.

This date was, by Act VI. of 1861, altered to the 1st day of January, 1862, and every part of the Code in which the 1st day of May, 1861, is mentioned, is to be construed as if the words "the 1st day of January, 1862," had been used instead.

Offences committed before the 1st of January, 1862, are still punishable under the old regulations. (Empress *v.* Mulna, 1 All. 599; see Empress *v.* Diljour, 2 Cal. 224.)

Punishment of offences committed beyond, but which by law may be tried within the Territories.

3. Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said Territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said Territories, in the same manner as if such act had been committed within the said Territories.

Punishment of offences committed by a servant of the Queen within a Foreign allied State.

4. Every servant of the Queen shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof, of which he, whilst in such service, shall be guilty on or after the said 1st day of May, 1861, within the dominions of any Prince or State in alliance with the Queen, by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India.

For commentary on ss. 2, 3, 4, see Part II., Chap. II.

Certain laws not to be affected by this Act.

5. Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV., Chapter 85, or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said Territories, or the Inhabitants thereof, or any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty or of the East India Company, or of any Act for the Government of the Indian Navy, or of any special or local law.

Commentary.

The words "special" and "local law" are defined by ss. 41, 42, of Chap. II.

Although an offence is expressly made punishable by a special or local law, it will be also punishable under the Penal Code, if the facts come within the definitions of the Code. (Reg. *v.* Ramachandrappa, 6 Mad. 249.) Accordingly, the High Court of Madras held that a prisoner might be punished, under s. 465, for making a false declaration under s. 5 of Act X. of 1841 (Ship Register), though a specified penalty is provided by s. 23 of that Act. (Rulings of 1865 on s. 5.) No such prosecution is admissible, if it appears upon the whole frame of the special act that it was intended to be complete in itself, and to be enforced only by the penalties created by it. (Chandi Pershad *v.* Abdur Rahman, 21 Cal. 131, at p. 138.) The Court of Session has jurisdiction to hear appeals on sentences passed by a Magistrate under such special and local laws (Rulings of Mad. H. C. 1865, on s. 409 of Cr. P. C. Act XXV. of 1861); and conversely, it is no reason for quashing a conviction under a special law, for instance, under s. 29 of Act V. of 1861 (General Police), that the facts would constitute an offence punishable under the Penal Code. (Kasimuddin, *in re*, 4 Wym. Cr. 17, S.C. 8 Suth. Cr. 55.) But, of course, a person cannot be punished under both the Penal Code and a special law for the same offence. (Reg. *v.* Hussun Ali, 5 N.W.P. 49.)

CHAPTER II.

GENERAL EXPLANATIONS.

Definitions in the Code to be understood subject to exceptions.

6. THROUGHOUT this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision, or illustration.

Illustrations.

(*a*) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) A, a Police Officer without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement, for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

Expression once explained is used in the same sense throughout the Code.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with this explanation.

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

Number.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

"Man." "Woman."

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

"Person."

11. The word "person" includes any Company or Association or body of persons, whether incorporated or not.

"Public."

12. The word "public" includes any class of the public or any community.

"Queen."

13. The word "Queen" denotes the sovereign for the time being of the United Kingdom of Great Britain and Ireland.

"Servant of the Queen."

14. The words "servant of the Queen" denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," or by or under the authority of the Government of India or any Government.

See as to "Government," *post*, s. 17.

"British India."

15. The words "British India" denote the Territories which are or may become vested in Her Majesty by the said Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales Island, Singapore, and Malacca.

"Government of India."

16. The words "Government of India" denote the Governor-General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone as regards the powers which may be lawfully exercised by them or him respectively.

"Government."

17. The word "Government" denotes the person or persons authorized by law to administer Executive Government in any part of British India.

"Presidency."

18. The word "Presidency" denotes the Territories subject to the Government of a Presidency.

"Judge."

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(*a*) A Collector exercising urisdiction in a suit under Act X. of 1859, is a Judge.

(*b*) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(*c*) A Member of a Punchayet which has power, under Regulation VII. of 1816 of the Madras Code, to try and determine suits, is a Judge.

(*d*) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

Commentary.

Regulation VII. of 1816, it may be as well to mention, is repealed by Act III. of 1873 (Civil Courts).

"Court of Justice."

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration.

A Punchayet acting under Regulation VII. of 1816 of the Madras Code, having power to try and determine suits, is a Court of Justice.

See note above.

"Public servant."

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—

First.—Every Covenanted Servant of the Queen;

Second.—Every Commissioned Officer in the Military or Naval Forces of the Queen while serving under the Government of India, or any Government;

Third.—Every Judge;

Fourth.—Every Officer of a Court of Justice whose duty it is, as such Officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.—Every Juryman, Assessor, or Member of a Punchayet assisting a Court of Justice or public servant;

Sixth.—Every Arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.—Every Officer of Government whose duty it is, as such Officer, to prevent offences, to give information of offences, to bring offenders to Justice, or to protect the public health, safety, or convenience;

Commentary.

A person appointed by the Government-Solicitor, under the authority of the Governor-General in Council, to prosecute in the Calcutta Police Courts, is a public servant within this section. (Empress *v.* Butto Kristo, 3 Cal. 497.)

A Coroner is a public servant; Act IV. of 1871, s. 5.

Ninth.—Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every Officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty;

Commentary.

For instance, a supernumerary peon of the Collector's Court, who received no fixed pay, but was remunerated by fees when employed to serve any process. (Reg. *v.* Ram Krishna, 7 B.L.R. 446; S.C. 16 Suth. Cr. 27.)

The word "officer" in this clause means a person who represents Government, either directly, or as an auxiliary to such direct representative. A person who receives property or revenue on his own account, as, for instance, the lessee of a village, is not an officer of Government, although he is bound to keep accounts, and to give over a share to Government. (Reg. *v.* Ramajirav, 12 Bom. H. C. 4.) Nor is a clerk in a bank, which carries on the treasury business, a public servant, as any money which he receives is received on behalf of the bank. (Modun Mohun, *in re*, 4 Cal. 376.)

Tenth.—Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town, or district.

Illustration.

A Municipal Commissioner is a public servant.

Commentary.

So is an Engineer who receives and pays to others Municipal monies, although he has not the power of sanctioning such expenditure. (Reg. *v.* Nantamram, 6 Bom. H.C. C.C. 64.) A person employed by the manager of an estate under the Court of Wards is not a public servant. (Reg. *v.* Arayi, 7 Mad. 17.) Nor is a labourer or menial servant who is employed to do work or labour on account of the Government, as, for instance, a carter. (Reg. *v.* Nachimuttu, 7 Mad. 18.)

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Commentary.

Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties and accepts those responsibilities, and is recognized as filling the position of a public servant, must be regarded as one. This was so held by the Allahabad High Court, in the case of a person who had been acting as a volunteer in the Tahsildar's office. (Reg. *v.* Parmeshar, 8 All. 201.)

"Movable property."

22. The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth.

"Wrongful gain."

"Wrongful loss."

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

"Wrongful gain" includes wrongful retention of property.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is

"Wrongful loss" includes the being wrongfully kept out of property.

wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

For commentary on s. 23, see Part II., ss. 489, 490.

"Dishonestly."

24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."

"Fraudulently."

25. A person is said to do a thing "fraudulently," if he does that thing with intent to defraud, but not otherwise.

For commentary on ss. 24, 25, see Index: "Dishonestly," "Fraudulently."

"Reason to believe."

26. A person is said to have "reason to believe" a thing, if he had sufficient cause to believe that thing, but not otherwise.

Property in possession of wife, clerk, or servant.

27. When property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily, or on a particular occasion, in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

"Counterfeit."

28. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. (Act I. of 1889, s. 9.)

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

"Document."

See Part II., s. 577.

Explanation 1.—It is immaterial by what means, or upon what substance, the letters, figures, or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A Check upon a Banker is a document.

A Power of Attorney is a document.

A Map or Plan which is intended to be used, or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures, or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures, or marks within the meaning of this section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a Bill of Exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the Bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder," or words to that effect, had been written over the signature.

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

"Valuable security."

Illustration.

A writes his name on the back of a Bill of Exchange. As the effect of this endorsement is to transfer the right to the Bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

Commentary.

A settlement of account in writing, though unsigned and containing no promise to pay, has been held to be a "valuable security" as being evidence of an obligation. (*Ex parte* Kapalavaya, 2 Mad. H. C. 247.) A Sunnud conferring a title of dignity is not a valuable security. (Jan Mahomed *v.* Empress, 10 Cal. 584.)

"A Will.

31. The words "a Will" denote any testamentary document.

Words referring to acts include illegal omissions.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

"Act." "Omission."

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

Each of several persons liable for an act done by all in like manner as if done by him alone.

34. When a criminal act is done by several persons, i furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. (Act XXVII. of 1870, s. 1.)

For commentary on s. 34, see Part II., ss. 230, 231.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

For commentary on s. 35, see Part II., s. 232.

Effect caused partly by act and partly by omission.

36. Wherever the causing a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

Co-operation by doing one of several acts constituting an offence.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations.

(*a*) A and B agree to murder Z by, severally and at different times, giving him small doses of poison. A and B administer the poison according to the agreement, with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence, though their acts are separate.

(*b*) A and B are joint jailors, and as such have charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(*c*) A, a jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food, in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder; but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

For commentary on ss. 37, 38, see Part II., s. 229.

Several persons engaged in the commission of a criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks Z under such circumstances of grave provocation, that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

"Voluntarily."

39. A person is said to cause an effect "voluntarily," when he causes it by means whereby he intended to cause it, or by means, which, at the time of employing those means, he knew, or had reason to believe, to be likely to cause it.

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by this act; yet if he knew that he was likely to cause death, he has caused death voluntarily.

For commentary on s. 39, see Part II., s. 221.

"Offence."

40. Except in the chapter and sections mentioned in clauses two and three of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV. and in the following sections, namely, sections 64, 65, 66, 67 (Act X. of 1886), 71 (Act VIII. of 1882), 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined:

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine. (Act XXVII. of 1870, s. 2.)

Commentary.

The word "offence" does not extend to acts punishable by English law. See *post*, note to s. 224; and as to abetment of such offences, see note to s. 109. Nor to cases which authorize an arrest under s. 55 of the Crim. P. C. of 1882. (Empress *v.* Kandhaia, 7 All. 67.)

"Special law."

41. A "special law" is a law applicable to a particular subject.

"Local law."

42. A "local law" is a law applicable only to a particular part of British India.

"Illegal." "Legally bound to do."

43. The word "illegal" is applicable to every thing which is an offence, or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

"Injury."

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation, or property.

"Life."

45. The word "life" denotes the life of a human being, unless the contrary appear from the context.

"Death."

46. The word "death" denotes the death of a human being, unless the contrary appear from the context.

"Animal."

47. The word "animal" denotes any living creature, other than a human being.

"Vessel."

48. The word "vessel" denotes anything made for the conveyance by water of human beings, or of property.

"Year." "Month."

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British Calendar.

"Section."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

"Oath."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of Justice or not.

See Indian Oaths Act, X. of 1873.

"Good faith."

52. Nothing is said to be done or believed in "good faith," which is done or believed without due care and attention.

See as to "good faith," Bhawoo Jivaji *v.* Mulji Dyal, 12 Bom. 377; and Part II., s. 654.

CHAPTER III.

OF PUNISHMENTS.

"Punishment."

53. THE punishments to which offenders are liable under the provisions of this Code are :

First.—Death.

Secondly.—Transportation.

Thirdly.—Penal servitude.

Fourthly.—Imprisonment, which is of two descriptions, namely :—

(1) Rigorous, that is, with hard labour.

(2) Simple.

Fifthly.—Forfeiture of property.

Sixthly.—Fine.

Seventhly.—Whipping (Act VI. of 1864, s. 1).

54. In every case in which sentence of death shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Commutation of sentence of transportation for life.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Commentary.

"When any person has been sentenced to punishment for an offence, the Governor-General in Council, or the Local Government (*ante*, s. 17), may, at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence, or remit the whole or any part of the punishment to which he has been sentenced." (Cr. P. C., s. 401; Act X. of 1886, s. 11, cl. 1.) Or may, "without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it: death, transportation; penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced;

simple imprisonment for a like term, fine." (Cr. P. C., s. 402.) As to the effect of a breach of any condition on which a sentence was suspended or remitted, see Act X. of 1886, s. 11, cl. 2.

Europeans and Americans to be sentenced to penal servitude instead of transportation.

56. Whenever any person being a European or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude, instead of transportation, according to the provisions of Act XXIV. of 1855:

(The Penal Servitude Act.)

Provided that where a European or American offender would, but for such act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life. (Act XXVII. of 1870, s. 3.)

Fractions of terms of punishment.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

Offenders sentenced to transportation how to be dealt with until transportation.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Commentary.

The place, or places, of transportation, are to be appointed by the Governor-General, and directions for the removal of each convict are to be given by the Local Government, unless in the case of a person already undergoing a previous sentence of transportation, Act IX. of 1882 (Prisoners Act Amendment). The place of transportation is not to be specified by the Court passing the sentence. (Cr. P. C., s. 368.)

In what cases transportation may be awarded instead of imprisonment.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for

a term not less than seven years, and not exceeding the term for which, by this Code, such offender is liable to imprisonment.

Commentary.

This section can only be applied where the particular offence for which the prisoner is transported is punishable with imprisonment for seven years or upwards. It is not competent to a Judge, where a prisoner is convicted of several offences, each punishable with a shorter term of imprisonment, but conjointly exceeding seven years, to add all the periods together, and then commute into transportation. (Reg. *v.* Prem Chund, Suth. Sp. Cr. 35; see also Reg. *v.* Mootkee, 2 Suth. Cr. 1; Reg. *v.* Shonaullah, 5 Suth. Cr. 44.) Where a prisoner is convicted at the same time of two offences, for each of which seven years' imprisonment may be awarded, a sentence of ten years' transportation —viz. seven years for one offence and three years for the other—would be illegal. No shorter period of transportation than seven years can be allotted for any offence. (Reg. *v.* Gour Chander Roy, 8 Suth. Cr. 2.) Nor can the transportation awarded under this section exceed the imprisonment for which the prisoner might have been sentenced, even though it would have been open to the Judge to award a longer period of transportation under the section appropriate to the crime. Therefore, where the particular crime is punishable by transportation for life, or ten years' imprisonment, if the Judge does not wish to inflict the extreme penalty, he cannot give more than ten years' transportation. (Reg. *v.* Rughoo, Suth. Sp. Cr. 30; Reg. *v.* Keifa Singh, 3 Suth. Cr. 16; Reg. *v.* Meriam, 1 B.L.R.A. Cr. 5, S.C. 10 Suth. Cr. 10.)

"The correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time that under s. 59 of the Penal Code such transportation is awarded instead of imprisonment, simple or rigorous, as the case may be." (2 Wym. Circ. 19.)

Where an offence is punishable with imprisonment for a longer period than seven years and with fine, the Court cannot sentence to transportation and fine, and to further transportation in default of fine. The transportation is only authorized under s. 59, in lieu of imprisonment as a substantive punishment. Accordingly, where a Court had sentenced a prisoner to nine years' transportation and a fine of Rs. 300, and in default of payment to further transportation for three years, the Madras High Court directed the Judge to pass a revised sentence as to the punishment to be inflicted in default of payment. (Kunhussa *v.* the Queen, 5 Mad. 28.) *Quære:* what sentence could he pass?

The power given by s. 59 can be exercised by any officer who is authorized to inflict a punishment amounting to seven years' imprisonment. But a Magistrate, who can only imprison for two years, cannot transport, although the offence which he is trying is punishable with imprisonment for a term of upwards of seven years' imprisonment. (Boodhova, *in re*, 9 Suth. Cr. 6.)

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender, to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Commentary.

Offenders under the age of sixteen years, when sentenced to transportation or imprisonment for any offence may, by order of the Court which has sentenced them, or of a Magistrate after sentence, be committed to a reformatory, instead of to the criminal gaol. (Act V. of 1876, ss. 7–9. Reformatory Schools Act.)

The period of imprisonment under the sentence of a Criminal Court is to be calculated from the date on which such sentence was passed. The period during which a sentence may be suspended, pending appeal, is not to be reckoned in calculating the term of imprisonment, if the appeal be rejected. (Sudder Court Rules, 28th April, 1862.)

The law takes no notice of fractions of a day; and therefore a sentence of imprisonment given, suppose, on the 25th of October, counts from the beginning of that day, that is from midnight of the 24th. A calendar month expires at midnight of the day in the next month numerically corresponding to that day from which it counts as having commenced. If there is no such day, then on the last day of the month. For instance, one month's imprisonment given on the 28th of February would expire at midnight on the 27th of March. A sentence given on the 31st of October would expire at midnight on the 30th of November. But if it had been given on the 31st of January, it would expire on the 28th of February. Thus the prisoner sentenced to a calendar month's imprisonment will never be imprisoned for a greater number of days than there are in the month in which he was sentenced, and may be imprisoned a lesser number of days. The same rule applies in any greater number of months. (Migotti *v.* Colvell, 4 C.P.D. 233.)

A sentence of imprisonment ought to commence from the time when sentence is passed, unless there is some lawful reason for ordering it to commence at some future period. Except as in the cases provided for by ss. 46, 47, 48 (now ss. 35, 396, 397) of the Criminal Procedure Code, a Magistrate cannot authorize a sentence passed by him to take place at some future date; nor, except as provided by s. 421 (now s. 426) of the same Code, can a sentence, which is to take place immediately, be suspended. (Krishnanand, *in re*, 3 B.L.R.A. Cr. 50; S.C. 12 Suth. Cr. 47; *Sub Nomine* Kishen Soonder.)

"When any person is or has been sentenced to imprisonment by any Court, the Local Government or (subject to its order and under its control) the Inspector-General of Jails may order his removal during the period prescribed for his imprisonment, from the jail or place in which he is confined

to any other jail or place of imprisonment within the territories subject to the same Local Government." (Act V. of 1871, s. 30. Prisoners.)

The power given by this section must be strictly observed; and, therefore, if the order of removal is made by any other authority than the Local Government or the Inspector-General of Jails, or if the prisoner is removed to any prison beyond the jurisdiction of the same Local Government, his detention will be illegal, and he will be entitled to his release. The subject was a good deal discussed in a case under the Mutiny Act, 20 Vict. c. 13. Under s. 40, the keeper of any prison is authorized to keep any military offender, on the delivery of an order in writing to him from the Officer Commanding the Regiment to which the offender belongs. Under s. 41, the officer who commands the district is authorized, by an order in writing, to direct the removal of any prisoner under sentence of a Court Martial, to be delivered over into military custody for the purpose of being removed to some other prison, or place, there to undergo the remainder of his sentence. Lieut. Allen was sentenced to four years' imprisonment, and consigned to custody in the Agra Fort. Afterwards the Officer Commanding the District directed that he should be removed to England to undergo the remainder of his sentence, but the order specified no place of custody. On his arrival in England he was placed in several prisons, and ultimately confined in the Queen's Prison, under an order from the Commander-in-Chief of the Forces. It was held that the keeper of the Queen's Prison had no authority to detain him, since there was no order for his custody in that prison either under s. 40 or 41. (*In re*, Allen, 30 L.J.Q.B. 38; Reg. *v.* Mount, L.R. 6 P.C. 305.)

The order made under Act V. of 1871, s. 30, should, I conceive, specify the place to which the removal is ordered.

Sentence of forfeiture of property.

61. In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Illustration.

A, being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, A's father dies, leaving an estate which, but for the forfeiture, would become the property of A. The estate becomes the property of Government.

Commentary.

The effect of this section is to combine, for the benefit of the Crown, the English doctrines of forfeiture and escheat. Forfeiture only took place in reference to property vested in the criminal at the time.

"But the law of escheat pursued the matter still further. For the blood of the tenant being utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future. This may farther illustrate the distinction between forfeiture and escheat. If, therefore, a father were seized in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life; but nothing would be forfeited to the king, for the son never had any interest in the lands to forfeit." (1 Steph. Com. 418.)

Under the above section the son would have taken the lands, but only for a second of time, in order to pass them on to the Crown.

It may be necessary to observe that a party who labours under forfeiture, stands in the way of the descent of property to others just as if he were not subject to any such incapacity.

And, therefore, according to English law, the attainder of an elder son would intercept the rights of a younger son, and of all other collateral relations, who could only take after him. If, therefore, he could not take for himself, and they could not take in consequence of his blocking up the way, the estate necessarily escheated. (1 Steph. Com. 420.) But it may well be questioned whether this would be the case with Hindus under Mitakshara law, where the sons take, not after, but along with, the father, as his co-heirs. It is to be observed, too, that forfeiture under the Code has not the effect of corrupting the blood and extinguishing its power of transmitting inheritable rights. The moment the sentence has expired, the stream of inheritance flows on unimpeded. It is only the personal rights of the convict which are transferred to Government, by a sort of statutory conveyance, but I conceive that Government takes nothing which he could not have assigned away. And so it was by English law, that the attainder of the ancestor did not prevent the descent of an estate entailed upon his issue, because they claimed not from him, but by virtue of the previous gift to themselves as his children. (Williams, R.P. 49.)

This question, as to the effect of a forfeiture for the crime of a father upon the rights of a son, arose for decision in the Bengal High Court in the case of an impartible Zemindary. The estate had been forfeited for rebellion under Act XXV. of 1857 (Native Army: Forfeiture for Mutiny), and was claimed for the son, on the death of the father, on the ground that the father's rights only could be confiscated, and that under the law of the Mitakshara, by which the case was admittedly governed, the son by birth became co-owner with his father, and his rights could not be effected by his father's acts. The Court, however, held that the father represented the whole estate, and that the Mitakshara law, by which each son has by birth a property in the paternal estate, is inconsistent with a custom according to which the estate was impartible and descended to the eldest son. *Couch*, C.J., said:

"The plaintiff's case in truth is that only the eldest son becomes a co-owner with his father, which is not the law of the Mitakshara. Either all the sons must become so, or none of them do, and the right of the eldest is only to inherit on his father's death. (Thakoor Kapilnauth *v.* the Government, 13 B.L.R. 445, 460; S.C. 22 Suth. 17, 21; Rani Sartaj Kuari *v.* Rani Deoraj, 15 I.A. 51 S.C. 10 All. 272.)

In cases where the crime does not specifically carry with it a forfeiture, there may be an express declaration of forfeiture by the Court under the succeeding section. This declaration must, I imagine, form part of the sentence, and be made at the time it is announced.

Forfeiture of property in respect of offenders punishable with death, transportation, or imprisonment.

62. Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, movable and immovable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his movable and immovable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependents as the Government may think fit to allow during such period.

Amount of fine.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Commentary.

Where the Penal Code provides that an offender shall be punished with imprisonment, and *shall also* be liable to fine, it is necessary that the sentence should include some period of imprisonment, if only a moment. Where, under such sections, a fine only was imposed, the Court annulled the sentence as being illegal, directed the fine to be returned, and ordered the Lower Court to pass a new sentence, of which imprisonment should be either the whole or a part. (Reg. *v.* Chenviowa, 1 Bom. H. C. 4; Reg. *v.* Rama, *ib.* 34; Reg. *v.* Buheerjee, *ib.* 39; 4 Mad. H. C., App. xviii.)

Where more than one person is fined on conviction for a joint offence, the sentence must impose a specific fine on each prisoner. (5 Mad. H. C., Rulings 5, S. C. Weir 8 [13].)

Sentence of imprisonment in default of payment of fine.

64. In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or (Act X. of 1886, s. 21) with fine only, in which the offender is sentenced to a fine (Act VIII. of 1882, s. 2), it shall be competent to the Court which sentences such

offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence.

Commentary.

This section, read with s. 33 of the Cr. P. C., does not render it imperative to record a sentence of imprisonment in default of payment of fine. (Mad. H. C. Rul., 7th Dec., 1866; Mad. H. C. Rul., 5th April, 1870, Weir, 9 [14].)

This section only applies to convictions under the Penal Code. Therefore, where a Magistrate inflicted a fine under s. 48 of Act XXIV. of 1859 (Police), and then, as an alternative, imposed a term of imprisonment under this section, the Madras High Court quashed the convictions. They held that under Act XXIV. of 1859, s. 48, he had to elect between fine and imprisonment, and if he preferred the former punishment, he could only enforce it in the manner laid down by Act V. of 1865 (Police: Mad. Act). (3 Mad. H. C., App. ix., S.C. Weir, 8 [14]; 7 Mad. H. C., App. xxii., S.C. Weir, 380 [557–559]; see also note to s. 70, *post.*) And so it was decided under a local Act (III. of 1864, Abkari: Mad. Act) which provided fines only for violation of its provisions, and gave a special procedure for levying them. (6 Mad. H. C., App. xl., S.C. Weir, 332 [464].)

Limit of term of imprisonment for default in payment of fine, when the offence is punishable with imprisonment as well as fine.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine, shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Commentary.

"The Court of any Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law in case of such default: Provided that the term is not in excess of the Magistrate's powers under this Code:

"Provided also, that in no case decided by a Magistrate, where imprisonment has been awarded as part of the substantive sentence, shall the period of imprisonment awarded in default of payment of the fine exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence, otherwise than as imprisonment in default of payment of fine." (Cr. P. C., s. 33.)

Section 309 of the Crim. P. C. of 1872, which is substantially the same as above section, has been explained by the High Court of Madras as follows:—

"It starts with one general principle, viz. that no Criminal Court shall award alternatively a longer term of imprisonment than one-fourth of that which the law provides as the maximum substantive punishment, where it

provides imprisonment at all as a substantive punishment. Then comes in the proviso, which is applicable only to Magistrates whose powers to imprison have been further limited by the previous sections. If they choose to imprison as well as fine, then their power to a further term of imprisonment for non-payment of the fine is further restricted. Not only shall they not impose more than a fourth of the maximum term provided for the particular offence, but they shall not exceed a fourth of the term to which the previous sections had restricted their general powers. The clause in question (cl. 1 of s. 33 answers to it) comes next. It also is applicable to Magistrates only, but it deals with cases in which they might have passed a substantive period of imprisonment, but have chosen to fine only. In such a case, the additional restriction, which had been imposed by the preceding clause (cl. 2 of s. 33) is removed, and the Magistrate may go up to the full term which he has been generally empowered to inflict, provided that the sentence is one otherwise allowed by law. I do not think that a sentence of alternative imprisonment exceeding one-fourth of the maximum substantive term provided for the offence (when such a term has been provided) is in any case allowed by law."

(Full Bench Ruling of Madras High Court, Weir's Criminal Digest, 335, followed Reg. *v.* Venkatesagadu, 10 Mad. 165, and overruling Reg. *v.* Muhammad, 1 Mad. 277.)

Description of imprisonment for such default.

66. The imprisonment which the Court imposes in default of payment of a fine, may be of any description to which the offender might have been sentenced for the offence.

Term of imprisonment for default in payment of fine, when the offence is punishable with fine only.

67. If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple (Act VIII. of 1882, s. 3), and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other cases.

Such imprisonment to terminate upon payment of the fine.

68. The imprisonment which is imposed in default of payment of a fine shall terminate, whenever that fine is either paid, or levied, by process of law.

Termination of such imprisonment upon payment of proportional part of fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid, or levied, that the term of imprisonment, suffered in default of payment, is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for

Fine may be levied within six years or at any time during the term of imprisonment.

Death of offender not to discharge his property from liability.

Commentary.

It has been ruled by the High Court of Bengal that s. 70 refers exclusively to cases which have been dealt with under the Code, and that fines, inflicted for offences punishable under other special and local laws, are not within the provisions of that section, unless its operation be specially extended thereto. (4 Suth. Crim. Letters, 7.)

The imprisonment which the Court is authorized to impose in default of payment is intended as a punishment for non-payment, not as a satisfaction and discharge of the amount due. The object of ss. 64–70 is explained by the authors of the Code, as quoted in the Commissioners' Second Report, 1847, s. 487.

"But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to whose very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine. But his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period, the fine may be levied on his effects by distress (s. 70). If the fine is paid or levied while he is imprisoned for

default of payment, his imprisonment will immediately terminate (s. 68), and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place" (s. 69).

Fines are to be enforced by the issue of a warrant for the levy of the amount, by distress and sale of any movable property belonging to the offender. Such warrant may be executed within the jurisdiction of the Court that issued it, and it shall authorize the distress and sale of any movable property belonging to the offender, without the jurisdiction of such Court, when indorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is situated. (Cr. P. C., ss. 386, 387.) Immovable property cannot be made liable for the payment of a fine. (Reg. *v.* Lallu, 5 Bom. H. C. C. C. 63.)

This mode of levying the fine may be adopted, even though the offender has undergone the full term of imprisonment to which he has been sentenced in default of payment of the fine. (Reg. *v.* Mudoosoodun, 3 Suth. Cr. 62.)

Commentary.

WHIPPING.—The law as to whipping was originally laid down in Act VI. of 1864, which, however, has been so amended that little of the original Act is now left. Sections 2, 3, and 4 have been replaced by new sections, by Act III. of 1895, s. 5. Section 5 of the Act of 1864 has received an explanation from Act III. of 1895. Section 6, and ss. 7 to 12, both inclusive, have been superseded by the Criminal Procedure Code.

Offences punishable with whipping in lieu of other punishment prescribed by Penal Code.

2. Whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code, that is to say :—

Group A.

(1) theft, as defined in section 378 of the said Code;

(2) theft in a building, tent or vessel, as defined in section 380 of the said Code;

(3) theft by a clerk or servant, as defined in section 381 of the said Code;

(4) theft after preparation for causing death or hurt, as defined in section 382 of the said Code;

Group B.

(5) extortion by threat, as defined in section 388 of the said Code;

(6) putting a person in fear of accusation in order to commit extortion, as defined in section 389 of the said Code;

Group C.

(7) dishonestly receiving stolen property, as defined in section 411 of the said Code;

(8) dishonestly receiving property stolen in the commission of a dacoity, as defined in section 412 of the said Code;

Group D.

(9) lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section;

(10) lurking house-trespass by night or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section.

On second conviction of offence mentioned in section 2, whipping may be added to other punishment.

3. Whoever, having been previously convicted of any one of the offences specified in the last preceding section, shall again be convicted of the same offence or of any offence included in the same Group of offences, may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence be liable under the Indian Penal Code.

Offences punishable, in case of second conviction, with whipping in addition to other punishment.

4. Whoever, having been previously convicted of any one of the following offences, shall be again convicted of the same offence, or of any offence included in the same Group of offences, may be punished with whipping in addition to any other punishment to which he may be liable under the Indian Penal Code, that is to say:—

Group A.

(1) giving or fabricating false evidence in such manner as to be punishable under section 193 of the Indian Penal Code;

(2) giving or fabricating false evidence with intent to procure conviction of a capital offence, as defined in section 194 of the said Code;

(3) giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment, as defined in section 195 of the said Code;

Group B.

(4) falsely charging any person with having committed an unnatural offence, as defined in sections 211 and 377 of the said Code;

Group C.

(5) assaulting or using criminal force to any woman with intent to outrage her modesty, as defined in section 354 of the said Code;

(6) rape, as defined in section 375 of the said Code;

(7) unnatural offences, as defined in section 377 of the said Code;

Group D.

(8) robbery or dacoity, as defined in sections 390 and 391 of the said Code;

(9) attempting to commit robbery, as defined in section 393 of the said Code;

(10) voluntarily causing hurt in committing robbery, as defined in section 394 of the said Code;

Group E.

(11) habitually receiving or dealing in stolen property, as defined in section 413 of the said Code;

Group F.

(12) forgery, as defined in section 463 of the said Code;

(13) forgery of a document, as defined in section 466 of the said Code;

(14) forgery of a document, as defined in section 467 of the said Code;

(15) forgery for the purpose of cheating, as defined in section 468 of the said Code;

(16) forgery for the purpose of harming the reputation of any person, as defined in section 469 of the said Code;

Group G.

(17) lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section;

(18) lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section.

Juvenile offender punishable with whipping for offences not punishable with death.

5. Any juvenile offender who commits any offence which is not by the Indian Penal Code punishable with death, may, whether for a first or any other offence, be punished with whipping in lieu of any other punishment to which he may for such offence be liable under the said Code.

Explanation.—In this section the expression 'juvenile offender' means an offender who in the opinion of the Court is under sixteen years of age, the decision of the Court on such matter being final and conclusive.

Commentary.

The effect of the Whipping Act is to make whipping a punishment under the Penal Code. Therefore, if a prisoner is convicted on the same day of two offences, for one of which whipping may be inflicted either in substitution of, or in addition to, other punishment, such whipping may be inflicted for such offence, and any other legal penalty for the other offence. (Maniruddin *v.* Gaur Chandra, 7 B.L.R. 165; S.C. 15 Suth. Cr. 89, overruling the F.B. decision in Nassir *v.* Chunder, 9 Suth. Cr. 41; 5 Mad. H.C. App. xviii.; S.C. Weir, 417.) In a case from Bombay, where a man was convicted of housebreaking in order to commit theft, and of theft, both offences being part of one continuous transaction, and he was sentenced to imprisonment on the first charge, and to whipping on the second, the High Court held that the sentence was not illegal, but that it was contrary to the spirit of the Code, and should not be repeated. (Reg. *v.* Genu, 5 Bom. H.C. C.C. 83.)

In cases coming within s. 2 of the Whipping Act, no other punishment can be inflicted along with the whipping for the offence for which whipping is inflicted. Punishment in that section means the whole of the punishments which might be awarded, if whipping was not inflicted. (Reg. *v.* Dagadu, 16 Bom. 357.)

It is held both by the Bengal and Bombay High Courts that s. 3 of this Act only applies to the cases of persons who, having undergone the punishment for a previous offence, and being undeterred or unreformed by it, commit a second offence. (Reg. *v.* Udai, 4 B.L.R.A. Cr. 5; S.C. 12 Suth. Cr. 68; Reg. *v.* Surya, 3 Bom. H.C. C.C. 38; Reg. *v.* Kusa, 7 *ibid.* 70.) The Madras High Court takes an opposite view, and has twice laid it down that the previous conviction required by s. 3 of the Whipping Act might be on the same day, and that the section did not mean "previously convicted and punished." (5 Mad. H.C. App. xviii.; S.C. Weir, 417.) I confess that the Ruling of the Bengal and Bombay Courts recommends itself more to my judgment. Of course the same construction will be applicable to the following section.

The previous offence must also be the same offence, or an offence of the same Group, as that of which the prisoner is convicted the second time. (5 Mad. H.C. App. 1; S.C. Weir, 416 [640]; Reg. *v.* Changia, 7 Bom. H.C. C.C. 68.) And the Madras High Court has ruled, that a sentence of whipping is not illegal because a conviction of some additional offence is combined with a second conviction of the same specific offence. (Weir, 2nd ed., 614.)

When offences specified in section 4 may be punished with whipping in frontier districts and wild tracts.

6. Whenever any local Government shall by Notification in the official Gazette have declared the provisions of this section to be in force in any frontier district or any wild tract of country, within the jurisdiction of such Local Government, any person who shall, in such district or tract of country, after such notification as aforesaid, commit any of the offences specified in section 4 of this Act, may be punished with whipping in lieu of any other punishment to which he may be liable under the Indian Penal Code.

7. [*Repealed by Cr. P. C., Sch. I. But as to exemption, see post, s.* 11, *p.* 30.]

Who may or may not pass sentence of whipping.

8. [This section and sections 11 and 12 are repealed by the Cr. P. C. of 1872. That of 1882 provides (s. 32) that whipping may be inflicted by Presidency Magistrates and Magistrates of the 1st class, and by Magistrates of the 2nd class if specially empowered by the Local Government, but in no case by Magistrates of the 3rd class.]

Commentary.

The extent of whipping to which a Magistrate may sentence is not limited, except by s. 10 of Act IV. of 1864, which limits the amount of the punishment generally. It matters not whether whipping is

imposed as a punishment by a magistrate or by a Sessions Judge; each of them, if he can pass the sentence at all, can impose it to the full extent authorized by the Act. (Per *Peacock*, C.J., Nassir *v.* Chunder, 9 Suth. Cr. 41; S.C. 5 Wym. Cr. 53; 5 Mad. H.C., App. xviii.; S.C. Weir, 417.)

Whipping if awarded in addition to imprisonment when to be inflicted.

9. [This and the following section, repealed by Act XVI. of 1874, are superseded by the Cr. P. C., which provides that when the punishment of whipping is awarded in addition to imprisonment, in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of such sentence, or if an appeal be made within that time until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or in case of an appeal as soon as practicable after the receipt of the order of the Court confirming the sentence.] (Cr. P. C., s. 391.)

Commentary.

In the case of a sentence of whipping in addition to imprisonment, the flogging must be inflicted immediately on the expiry of the fifteen days. Any direction to the contrary in a warrant is altogether illegal and void, and the warrant should be returned to the Court for amendment. (6 Mad. H.C., App. xxxviii.)

Mode of inflicting the punishment.

10. [In the case of a person of or over 16 years of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under 16 years of age, it shall be inflicted in the way of school-discipline with a light rattan. In no case shall such punishment exceed 30 stripes. The whipping shall be inflicted in the presence of the officer in charge of the jail; unless the Judge or Magistrate orders it to be inflicted in his own presence.] (Cr. P. C., ss. 391, 392.)

Punishment not to be inflicted if offender not in fit state of health.

11. [The punishment of whipping shall not be inflicted unless a Medical Officer, if present, certifies, or, if there is not a Medical Officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment. If, during

the execution of a sentence of whipping, a Medical Officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped. No sentence of whipping shall be executed by instalments; and none of the following persons shall be punishable with whipping (namely) females, males sentenced to death, or to transportation, or to penal servitude, or to imprisonment for more than five years, or males whom the Court considers to be more than 45 years of age.] (Cr. P. C., ss. 393, 394.)

Nor by instalments.

Nor on females or in certain cases.

Commentary.

Accordingly, if the prisoner is unable to suffer his whole sentence of whipping, he must be discharged as to the residue. (3 Wym. Circ. 3; 5 Mad. H.C., App. 1.) But the Court, in its discretion, may commute the sentence to imprisonment. (Cr. P. C., s. 395.)

The exemption applies even though the sentence of transportation, etc., has been passed in a different case, provided it has been already passed before the whipping is awarded. (1 Mad. 56, S.C. Weir, 645.)

12. [In any case in which, under section 394 (*ante*, s. 11), a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, which may be in addition to any other punishment to which he may have been sentenced for the same offence. Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.] (Cr. P. C., s. 395.)

Procedure if punishment cannot be inflicted under the last section.

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Limit of punishment of offence which is made up of several offences.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences. (Act VIII. of 1882, s. 4.)

Illustrations.

(*a*) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make the whole beating up. If A were liable to punishment for every blow he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(*b*) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

Commentary.

Where, however, a person is convicted at the same time of two or more offences punishable under the same or different sections of the Penal Code, he may be sentenced to several penalties on each, "such penalties, when consisting of imprisonment or transportation, to commence the one after the expiration of the other, in such order as the Court may direct. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a longer period than 14 years; provided, also, that if the case be tried by a Magistrate (other than a Magistrate acting under s. 34) the punishment shall not in the aggregate exceed twice the extent of the punishment which such Magistrate is by his ordinary jurisdiction compelled to inflict." (Cr. P. C., s. 35.) The limits fixed by this section refer to sentences passed simultaneously, or upon charges which are tried simultaneously. They do not apply to cases of offences committed by persons who are already undergoing sentence of imprisonment (Reg. *v.* Puban, 3 Wym. Cr. 5, S. C. 7 Suth. Cr. 1); nor to separate but successive trials of the same person for distinct offences. (Daulatia, *in re*, 3 All. 305.)

Where accumulated punishment is given under s. 35 of the Cr. P. C., separate sentences should always be given in the manner therein prescribed, otherwise in the event of an appeal, and a reversal of the conviction in one or more of the separate cases, it would be

impossible to determine to what portion of the aggregate imprisonment the prisoners still remained liable. Sentences of imprisonment passed under that section cannot be made to run concurrently. (4 Mad. H. C., App. xxvii.; Reg. *v.* Wazir Jan, 10 All. 58; Reg. *v.* Pir Mahomed, 10 Bom. 254.)

See also as to sentences on escaped convicts and prisoners already under sentence. (Cr. P. C., ss. 396–398, Act X. of 1886, s. 10.)

I. If in one set of facts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

II. If the acts alleged constitute an offence falling within two or more separate definitions of any law, in force for the time being, by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of such offences.

III. If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial with the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts. Nothing contained in this section shall affect the Indian Penal Code, Section 71 (Criminal Procedure Code, Section 235).

This section combined with s. 71 of the Penal Code seems to reproduce the provisions of the former Criminal Procedure Code (Act X. of 1872), s. 454. The omission of all those references to punishments in the section itself, and in the illustrations, which were contained in the repealed s. 454, shows that it is to be treated merely as containing rules for criminal pleading and procedure, and that the rules as to assessment of punishment must be sought for in s. 71 of the Penal Code, as amended by Act VIII. of 1882, and in the Cr. P. C. s. 35, *ante*, p. 11 (Acc. *per curiam*, 7 All., p. 33; 10 Bom., p. 496; 12 Mad. 39; 17 Bom., p. 270.)

The result of both sections seems to me to be as follows:—

First.—Where the repetition of several offences constitutes one offence of exactly the same character, all the instances taken together can only be treated as making up one offence, though the greater or lesser number of the instances may add to or diminish the heinousness of the offence. For example, a number of blows following upon each other only constitute one beating, s. 71, *ill.* (*a*). A number of lies in a continuous deposition only constitute one piece of false evidence, though the same lie in two depositions would be indictable and punishable separately as two distinct offences. (Castro *v.* the Queen, L.R. 6, App. 229.)

Secondly.—When a single transaction or connected series of events give rise to several offences of a different character, or to several offences of the same character affecting different persons, each such offence is separately indictable and punishable. For example, a man beats two people in the same crowd (s. 71, *ill.* (*b*)); or forms part of an unlawful assembly, and while acting with it wounds one person, and resists a public servant in the execution of his duty [Act X. of 1872, s. 454, *ill.* (*a*), (*f*); Act X. of 1882, s. 235, *ill.* (*a*), (*g*)]; or brings a false charge against another, and at the trial gives false evidence in

support of the charge (Act X. of 1872, s. 454, *ill.* (*d*); Act X. of 1882 s. 235, *ill.* (*f*); Reg. *v.* Abdool Azeez, 7 Suth. Cr. 59; Reg. *v.* Pi Mahomed, 10 Bom. 254). So a man may be separately convicted and punished under s. 457 for house-breaking by night, and under ss. 42(and 352 for mischief and assault. (Reg. *v.* Nirichan, 12 Mad. 36. Under the repealed section 454, the Calcutta High Court doubted whether a prisoner could be convicted on separate charges under ss. 147 and 324 of rioting and wounding another in the course of the riot, and decided that in any case the punishment must not exceed that for the graver offence. (Empress *v.* Jubdur, 6 Cal. 718.) It may be doubted, however, whether this decision was sustainable even under the old law. The riot and the wounding were certainly not a single act falling within two separate definitions under cl. 2 of s. 454; nor did the two together form a combined offence under either of the sections on which the indictment was framed. Under the Procedure Code of 1882 the same point has been frequently decided in an opposite manner. In one case on the subject the Allahabad Court said:—

"The offence of rioting, and the offences of voluntarily causing hurt, and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt, or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other offences. If, then, a person is accused of having committed the offence of rioting armed with a deadly weapon, and also with having at the same time committed the offences of voluntarily causing hurt to one person, and of voluntarily causing grievous hurt, by means of a dangerous weapon, to another person, he may, under the provisions of para. 1, s. 235 of the Crim. P. C., be charged with and tried, at one trial for each of the three above-mentioned offences; and in my opinion he may, under the provisions of s. 35 of the Crim P. C., be sentenced to three years' rigorous imprisonment under s. 148 of the P. C., to one year's rigorous imprisonment under s. 323, and to ten years rigorous imprisonment under s. 326, or to an aggregate punishment of fourteen years' rigorous imprisonment." (Empress *v.* Dungar Singh, 7 All. 29, 34 overruling Empress *v.* Ram Partab, 6 All. 121, followed Reg. *v.* Pershad, All. 414; Reg. *v.* Ram Sarup, *ib.* 757; Reg. *v.* Bisheshur, 9 All. 645; Lokenath *v.* Reg., 11 Cal. 349; Chandrakant *v.* Reg., 12 Cal. 495; Reg. *v.* Bana Punja, 17 Bom. 260; Motsun Mir. *v.* Reg., 16 Cal. 725; Ferasat *v.* Reg., 1 Cal. 105.)

In one case the offender had joined in a riot, and in the course of that riot some of the other rioters had committed grievous hurt in prosecuting the common object of the assembly. He himself had done no hurt to any one. He was convicted of rioting, and also of grievous hurt under s. 149 of the Penal Code, and was separately sentenced for each offence. The Calcutta Court set aside the double sentence holding that the case came under the first clause of s. 71. Here the prisoner had not in fact both rioted and committed grievous hurt. These would have been separate and independent offences. He had actually rioted, and he had constructively committed grievous hurt, by being mixed up with joint rioters who had actually committed hurt. Here the offence of rioting was an essential element in making out the grievous hurt, and to sentence him separately on each head would be to punish him twice over. (Nilmony Podder *v.* Reg., 16 Cal. 442, F.B. Reg. *v.* Bana Punja, 17 Bom. 260.)

Thirdly.—Where the same facts will constitute different offences, the indictment may, and ought to, charge each such offence so as to meet every possible view of the case. But only one offence has been committed, and the punishment must not exceed that applicable to the graver offence (s. 71, cl. 2).

Accordingly in Bombay it was held that a prisoner could not be at the same time punished for committing an offence by fire, with intent to destroy a warehouse, under s. 436, and for the offence of mischief by fire with the intent to cause damage to property above the value of Rupees 100 under s. 535. The Court said:—

"In some English cases one act, or set of acts, of the accused person has been held punishable under two different Statutes, and a double conviction and sentence have been sustained. In such cases the intention of the Legislature is to guard two interests of different species, and to prevent a person, who has offended against both, from escaping with a penalty provided for the defence of one only. The present is not such a case. The intention of the accused was solely to do one act, viz. to set fire to a warehouse; and the circumstance that the same act also answers to the definition of another and subordinate offence does not render him liable to an additional punishment for it. Such a case seems to be contemplated by s. 454 of the Criminal Procedure Code (Act X. of 1872), paragraph II. It is a general rule that when, in the same Penal Statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative unless it be so expressly provided." (Reg. *v.* Dod Basaya, 11 Bom. H.C. 13; Empress *v.* Banni, 2 All. 349.)

Fourthly.—Sometimes an act, which is itself an offence, becomes either a different offence, or an aggravated form of the same offence when combined with other facts, either in themselves innocent or criminal. Here also it may be proper not only to charge the offender with the compound offence but with the minor offences of which it is made up. But if the compound offence is made out, no punishment can be awarded beyond that which can be given in respect of it. For instance, upon the same facts a man may be charged for using criminal force under s. 352, and under s. 152 for the same force against a public servant. (Ferasat *v.* Reg., 19 Cal. 105.) But, though convicted on both charges, he could not receive a higher punishment than that which is provided by the latter section. So the offence which is punishable under s. 460 is made up of separate offences punishable under ss. 456, 304 and 325. But although the indictment should contain charges under all these sections, if the complete offence is made out, the punishment should be inflicted under, or at all events should not exceed that awarded by, s. 460. Nor could a prisoner be separately punished for being a member of an unlawful assembly under s. 143, and also under s. 147 for rioting as a member of the same unlawful assembly (*per curiam*, 6 All., p. 124). In the illustration (*m*) to Cr. P. C., s. 235, cl. III., the case is put of a person committing robbery on B, and, in doing so, voluntarily causing hurt to him. Here the hurt constitutes the element of force which changes theft into robbery. Under the same clause of the old section 454 (Act X. of 1872) two further illustrations (*n*) and (*p*) were given, in which the cases were put of a person breaking into a house to commit adultery, and then committing the adultery; or enticing away a married woman, and then committing adultery with her. In each case it was laid down that though separate charges and convictions

support of the charge (Act X. of 1872, s. 454, *ill.* (*d*); Act X. of 1882, s. 235, *ill.* (*f*); Reg. *v.* Abdool Azeez, 7 Suth. Cr. 59; Reg. *v.* Pir Mahomed, 10 Bom. 254). So a man may be separately convicted and punished under s. 457 for house-breaking by night, and under ss. 426 and 352 for mischief and assault. (Reg. *v.* Nirichan, 12 Mad. 36.) Under the repealed section 454, the Calcutta High Court doubted whether a prisoner could be convicted on separate charges under ss. 147 and 324 of rioting and wounding another in the course of the riot, and decided that in any case the punishment must not exceed that for the graver offence. (Empress *v.* Jubdur, 6 Cal. 718.) It may be doubted, however, whether this decision was sustainable even under the old law. The riot and the wounding were certainly not a single act falling within two separate definitions under cl. 2 of s. 454; nor did the two together form a combined offence under either of the sections on which the indictment was framed. Under the Procedure Code of 1882 the same point has been frequently decided in an opposite manner. In one case on the subject the Allahabad Court said:—

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"In some English cases one act, or set of acts, of the accused person has been held punishable under two different Statutes, and a double conviction and sentence have been sustained. In such cases the intention of the Legislature is to guard two interests of different species, and to prevent a person, who has offended against both, from escaping with a penalty provided for the defence of one only. The present is not such a case. The intention of the accused was solely to do one act, viz. to set fire to a warehouse; and the circumstance that the same act also answers to the definition of another and subordinate offence does not render him liable to an additional punishment for it. Such a case seems to be contemplated by s. 454 of the Criminal Procedure Code (Act X. of 1872), paragraph II. It is a general rule that when, in the same Penal Statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative unless it be so expressly provided." (Reg. *v.* Dod Basaya, 11 Bom. H.C. 13; Empress *v.* Banni, 2 All. 349.)

Fourthly.—Sometimes an act, which is itself an offence, becomes either a different offence, or an aggravated form of the same offence when combined with other facts, either in themselves innocent or criminal. Here also it may be proper not only to charge the offender with the compound offence but with the minor offences of which it is made up. But if the compound offence is made out, no punishment can be awarded beyond that which can be given in respect of it. For instance, upon the same facts a man may be charged for using criminal force under s. 352, and under s. 152 for the same force against a public servant. (Ferasat *v.* Reg., 19 Cal. 105.) But, though convicted on both charges, he could not receive a higher punishment than that which is provided by the latter section. So the offence which is punishable under s. 460 is made up of separate offences punishable under ss. 456, 304 and 325. But although the indictment should contain charges under all these sections, if the complete offence is made out, the punishment should be inflicted under, or at all events should not exceed that awarded by, s. 460. Nor could a prisoner be separately punished for being a member of an unlawful assembly under s. 143, and also under s. 147 for rioting as a member of the same unlawful assembly (*per curiam*, 6 All., p. 124). In the illustration (*m*) to Cr. P. C., s. 235, cl. III., the case is put of a person committing robbery on B, and, in doing so, voluntarily causing hurt to him. Here the hurt constitutes the element of force which changes theft into robbery. Under the same clause of the old section 454 (Act X. of 1872) two further illustrations (*n*) and (*p*) were given, in which the cases were put of a person breaking into a house to commit adultery, and then committing the adultery; or enticing away a married woman, and then committing adultery with her. In each case it was laid down that though separate charges and

might be had, the punishment could not exceed that which might be inflicted for the graver offence. Possibly, as regards the second illustration, the adultery might be considered only an aggravation or a completed form of the enticing. It is evident, as to the former case, that the adultery was wholly independent of and distinct from the house-breaking, and did not, in combination with the house-breaking, form any new offence known to the law. These illustrations have been omitted in the new section. In conformity with them, however, it had been decided in Madras that a person convicted and punished under s. 369, for abducting a child with intent dishonestly to take movable property, could not be separately punished under s. 379 for the actual theft which was contemplated by the abduction. (Noujan, *in re*, 7 Mad. H. C. 375.) Similar decisions were given in Allahabad and Bombay where the charges were of entering upon property to commit mischief, and of actually committing the mischief (ss. 425, 441, Empress *v.* Budh Singh, 2 All. 101); of house-breaking by night with intent to commit theft, and of theft in the house (ss. 457, 380, Reg. *v.* Tukaya, 1 Bom. 241; Empress *v.* Ajudhia, 2 All. 644). In the latter of the two Allahabad cases the Court seemed to think it necessary to enter a formal acquittal upon the minor charge (s. 380) in order to inflict a full punishment upon the graver one. Under the Code of 1882, however, the Bombay High Court has held that house-breaking by night with intent to commit theft, and theft in a dwelling-house (ss. 457, 380) were two distinct offences, which did not "constitute, when combined, a different offence," and could therefore be punished separately with the penalty appropriate to each offence. (Reg. *v.* Sakharam Bhau, 10 Bom. 493.) The same principle would probably be applied to offences under ss. 425 and 441. In a later case from Allahabad the High Court disapproved of the last-mentioned ruling in Empress *v.* Ajudhia, and laid it down, that where more than one offence is proved in respect of which the accused has been tried and convicted, a conviction for each offence must follow, whether the case falls under s. 71, of the P. C. or not, and that, subject to the provisions of that section, a separate sentence must be passed on each conviction. (Reg. *v.* Wazir Jan, 10 All. 58.) The mere circumstance that the same set of facts amounts to evidence of two different offences does not prevent a separate penalty for each, unless such set of facts constitutes the definition of each. A prisoner was indicted under s. 170, for personating a public servant. By means of this personation he was enabled to commit extortion, for which he was also indicted under s. 383. It was held that the case did not come under any clause of s. 71. Not under the 2nd clause, because the personation by itself did not amount to extortion, and not under the 1st or 3rd clauses, because the personation was only the accidental means by which the extortion was effected, and not one of the essential elements which make up the definition of the offence. (Reg. *v.* Wazir Jan, 10 All. 58.)

It may be well to append the following decisions as to cumulative punishment under the Code of 1861, though they are not all reconcilable with each other, and are not direct authorities upon the construction of the present Code.

It has been decided that cumulative sentences cannot be given on charges of possessing stolen property under s. 411, and of voluntarily concealing the same property under s. 414 (Huribuns Lall *v.* the

Queen, 4 R.J. & P. 122; 4 Mad. H. C., App. xiv., S.C. Weir, 105, 1st edition; p. 180, 2nd edition); of theft under s. 379, or criminal breach of trust under s. 409, and of receiving or retaining the same property under s. 411 (Reg. *v.* Sreemunt, 2 Suth. Cr. 63, S.C. 4 R.J. & P. 563; Reg. *v.* Seeb Churn, 11 Suth Cr. 12; Reg. *v.* Sheikh Mudun, 1 Suth. Cr. 27; Reg. *v.* Shunker, 2 N.W.P. 312); of culpable homicide, and of being a member of the unlawful assembly by which the homicide was committed (Reg. *v.* Rubeeollah, 3 Wym. Cr. 9, S.C. 7 Suth. Cr. 13); of using forged documents under s. 471, and of having them in possession with intent to use them under s. 474 (Reg. *v.* Nuzur Ali, 6 N.W. P. 39); of kidnapping under s. 363, and of restraint in order to kidnap under s. 346 (Reg. *v.* Mungroo, 6 N.W.P. 293); of kidnapping, and of intent to marry forcibly under s. 366 (Reg. *v.* Isree, 7 Suth. Cr. 56); of kidnapping, and of intent to steal from a child under ten years of age, under s. 369 (Reg. *v.* Shama, 8 Suth. Cr. 35); of criminal intimidation, with a threat of causing the death of a person under s. 506, and of criminal intimidation by posting up an anonymous communication against the same person under s. 507. (Reg. *v.* Zora, 4 Bom. H. C. Cr. 12.) So, also, where a particular section provides for the union of several criminal acts, *e.g.* grievous hurt committed in the act of house-breaking under s. 460, the prisoner ought to be indicted under it, and not for the separate offences of house-breaking and causing hurt under ss. 257 and 324. (Reg. *v.* Lukhun, 4 R.J. & P. 360.)

On the same principle, where a Joint Magistrate had passed a sentence against a prisoner on a charge of enticing away a married woman, and the Session Judge directed him to commit the prisoner for adultery, the Madras High Court ruled that the original sentence should have been at once annulled. There should not be two trials and two convictions before two separate tribunals on the same collection of facts, the requisite intention in the one case being the substantive delict in the other. (5 Mad. H. C., App. xvii.)

Where, however, a prisoner was charged with cutting down, and carrying away, a tree, the Bombay Court held that he might be punished on separate charges for mischief and theft, as the mischief was complete before the theft could have commenced. (Reg. *v.* Narayan, 2 Bom. H. C. 416.) In the following cases a double conviction for theft and mischief was held illegal: Bichuk *v.* Auhuck, 6 Suth. Cr. 5; Reg. *v.* Sahrae, 8 Suth. Cr. 31. And so it has been laid down, that the offence of rioting, armed with deadly weapons, under s. 148, is different from that of stabbing a person on whose premises the riot takes place, under s. 324 (Reg. *v.* Callachand, 7 Suth. Cr. 60; S.C. 3 Wym. Cr. 34; . *v.* Dina Sheikh, 10 Suth. Cr. 63; Reg. *v.* Hurgobind, 3 N.W.P. ; Empress *v.* Ram Adhin, 2 All. 139); that the offence of kidnap- under s. 463 is distinct from that of selling a minor for the on under s. 372 (Reg. *v.* Doorga Doss, 7 Suth. Cr. . Cr. 37); and that the offence of concealing property icate false evidence under s. 193 is different from that e same property, knowing it to be stolen under s. 414 *v.* Rameshar, 1 All. 379), and that separate sentences may be ch offence.

of confirmation or appeal, aggregate sentences of convictions for several offences at one trial shall be

deemed to be a single sentence. (Cr. P. C., s. 35; Reg. *v.* Gulam, 12 Bom. H. C. 147.) An appeal may be brought against any sentence referred to in s. 413 or s. 414 of the Crim. P. C. by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace; and a sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined. (Cr. P. C., s. 415.)

On the other hand, a Magistrate is not authorized to split up an offence, so as to give himself a jurisdiction over the parts which he would not have had over the whole, and thus to deprive the offender of his appeal. (Empress *v.* Abdool Karim, 4 Cal. 18.)

Punishment of a person found guilty of one of several offences, the judgment stating that it is doubtful of which.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.

Commentary.

This section points to a difficulty which had previously been without remedy. An indictment may contain several counts, each charging a distinct offence; for instance, a simple assault, and assault with intent to wound, and an assault with intent to rape. In strict logic, no conviction ought to take place unless the verdict can state which of the offences was perpetrated, and if it cannot be stated which of them, then it cannot be alleged with certainty that any one of them in particular was committed, and if so, there ought to be an acquittal. Now, however, a Judge will be authorized to find that the prisoner is guilty upon some one, but he is doubtful upon which, of the counts, and the sentence will then be given as if the prisoner had been convicted on the least aggravated charge.

It will be observed that to authorize a conviction under this section, the doubt must be as to which of the offences the accused has committed, not whether he has committed either. As the Commissioners observe (Second Report, 1847, s. 527):—

"But it is to be remembered that according to the supposition, the main facts which constitute the *corpus delicti* are proved, and that the doubt relates to some incidental point, which is of a quality important only as determining whether the offence falls technically under one designation or another; as, for example, where a man is charged with theft, but a doubt is raised by the evidence whether the party had not the property in trust." (Reg. *v.* Jamurha, 7 N.W P. 137.)

For the application of this section to cases of contradictory statements, in charges for giving false evidence, see Part II., ss. 315, 317. As to form of charge, see Cr. P. C., s. 236, Part II., ss. 699, 702.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

Solitary confinement.

A time not exceeding one month, if the term of imprisonment shall not exceed six months.

A time not exceeding two months, if the term of imprisonment shall exceed six months and shall not exceed one year. (Act VIII. of 1882, s. 5.)

A time not exceeding three months, if the term of imprisonment shall exceed one year.

Commentary.

There is nothing in s. 262 of the Crim. P. C. to preclude the Court from imposing solitary confinement as part of the sentence in a case tried summarily. (Empress *v.* Annu Khan, 6 All. 83.)

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such period; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Commentary.

Accordingly, where a prisoner had been sentenced to imprisonment for a year and a day, of which three months were to be passed in solitary confinement, the Madras High Court reduced the solitary confinement to a period of 84 days. (15th Dec., 1879; S.C. Weir, 1st edition, Sup. 1 [15].)

75. Whoever, having been convicted of an offence punishable under Chapter XII. or Chapter XVII. of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those chapters with imprisonment of either description for a term of three years or upwards, shall be

Punishment of persons convicted, after a previous conviction, of an offence punishable with three years' imprisonment.

subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years. (Act X. of 1886, s. 22.)

Commentary.

The Bengal High Court holds that the previous offence must have been committed since the Penal Code came into operation, so as to have been punishable under it. Therefore, a previous conviction for theft committed in 1860 was held not to authorize increased punishment under s. 75. (Reg. *v.* Hurpaul, 4 Suth. Cr. 9; Reg. *v.* Pubon, 5 Suth. Cr. 66.) A contrary ruling has been given by the Madras High Court. (1st August, 1864.) But considering the definition of the word "offence" in s. 40 of the Penal Code, as interpreted subsequently by Acts IV. of 1867 (defining "offence"), and XXVII. of 1870 (Penal Code Amendment), the view taken by the Bengal High Court seems to me to be preferable. Nor can the enhanced punishment be awarded, where the offence subsequently committed is merely an attempt to commit an offence punishable under Chapter XII. or XVII., or an abetment of such an offence. (Ruling of Mad. H. C., 1864, on s. 75, see Weir, 11-17 [16-23]; Empress *v.* Nana, 5 Bom. 140; Empress *v.* Ram Dayal, 3 All. 773; Reg. *v.* Sricharan Bauri, 14 Cal. 357.) It has also been decided in Bengal that the subsequent offence must be one committed after release from prison upon the previous conviction; the liability to enhanced punishment for the second offence being "on the ground that the sentence already borne has had no effect in preventing a repetition of crime, and has been, therefore, insufficient as a warning." Therefore, where a prisoner committed several offences, which were made the subject of several trials, the last trial taking place a few weeks after those preceding it, while the prisoner was still undergoing his sentence, the Court held that such convictions could not be charged under s. 75. (Reg. *v.* Pubon, *supra.*) It is quite clear that the second offence must have been committed after the conviction for the first. (Empress *v.* Megha, 1 All. 637.) But if a prisoner, in gaol for theft, committed another theft in gaol, it is difficult to see why he should not receive an enhanced punishment.

This section is intended to provide for a more severe sentence than that allotted to the offence with which the prisoner is charged, when such sentence is not adequate to the offence. Recourse should not be had to it, where the normal penalty is sufficient; still less when the effect of applying it would be to diminish the punishment. For instance, when the offence charged under s. 457 was punishable with fourteen years' imprisonment, if the Court is not disposed to inflict transportation for life, s. 75 should not be made use of, since under it only ten years' imprisonment can be inflicted. (Shoo Saran Tato *v.* Empress, 9 Cal. 877.)

When it is intended to prove a previous conviction under this section, the fact, date, and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed. (Crim. P. C., s. 221.) The object is to enable the prisoner to know specifically what previous offence will be used for the purpose of enhancing his punishment. It

is not sufficient to allege that he had been previously convicted of offences under Chapter XVII. of the Indian Penal Code. (Reg. *v.* Sheikh Jakir, 22 Suth. Cr. 39.) Where there is no such charge, the awarding of enhanced punishment is illegal, unless the charge is entered up, and the prisoner is called upon to plead to it before sentence is passed. (Reg. *v.* Rajcoomar Bose, 19 Suth. Cr. 41; Reg. *v.* Esan Chunder, 21 Suth. Cr. 40; Reg. *v.* Dorasami, 9 Mad. 284.)

The procedure in trying the charge is laid down by s. 310 of the Criminal Procedure Code. The previous conviction is not brought to the notice of the jury until the substantive offence has been fully tried, unless it is itself relevant to the principal charge. Where there is a jury, and the previous conviction is not admitted, the evidence to establish it and the identity of the prisoner must be left to them, and found by them as a fact. (Reg. *v.* Esan Chunder, *ub. sup.*) The mode of proving a previous conviction is stated in s. 511 of the Criminal Procedure Code.

Where a previous conviction is proved for the purposes of s. 75 of the Penal Code, the prisoner cannot be dealt with under s. 35 of the Criminal Procedure Code as if he had been convicted of two offences. (Reg. *v.* Khalak, 11 All. 393.)

CHAPTER IV.

GENERAL EXCEPTIONS.

For commentary on this chapter, see Part II., Chap. III., and the special references appended to the following sections.

Act done by a person bound or by mistake of fact believing himself bound by law.

76. NOTHING is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it.

Illustrations.

(*a*) A, a soldier, fires on a mob by order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(*b*) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.

For commentary upon the cases in which a person is bound by law under s. 76, or justified by law under s. 79 in doing certain acts, see Part II., Chap. III., ss. 81–120, 140–155.

For Mistake of Fact, see ss. 121–124.

For Mistake of Law see ss. 125–127.

Act of Judge when acting judicially.

77. Nothing is an offence which is done by a Judge, when acting judicially in the exercise of any power which is, or which in good faith he believes to be given to him by law.

For commentary on s. 77, see Part II., ss. 128–137.

Act done pursuant to the judgment or order of a Court of Justice.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

For commentary on s. 78, see Part II., ss. 138, 139.

Act done by a person justified, or by mistake of fact believing himself justified by law.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing

Illustration.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence. (See Bhawoo Jivaji *v.* Mulji Dyal, 12 Bom. 377.)

For commentary on s. 79, see note to s. 76.

Accident in the doing of a lawful act.

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

Illustration.

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

For commentary on s. 80, see Part II., ss. 156–158.

Act likely to cause harm, but done without a criminal intent and to prevent other harm.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing, or avoiding, other harm to person or property.

Explanation.—It is a question of fact in such a case, whether the harm to be prevented, or avoided, was of such a nature, and so imminent, as to justify, or excuse, the risk of doing the act, with the knowledge that it was likely to cause harm.

Illustrations.

(*a*) A, the captain of a steam vessel, suddenly, and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C, with only 2 passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C, and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C, by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat C.

(*b*) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence. (See Reg. *v.* Boslan, 17 Bomr. 626.)

For commentary on s. 81, see Part II., ss. 159–161.

Act of a child under 7 years of age.

82. Nothing is an offence which is done by a child under seven years of age.

Act of a child above 7 and under 12 years of age, who has not sufficient maturity of understanding.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conoccasion.

For commentary on ss. 82, 83, see Part II., s. 162.

Act of a person of unsound mind.

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

For commentary on s. 84, see Part II., ss. 163–187.

Act of a person incapable of judgment by reason of intoxication caused against his will.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a l
toxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

For commentary on ss. 85, 86, see Part II., ss. 188, 189.

Act not intended and not known to be likely to cause ath or grievous ..., done by con-

87. Nothing, which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person, who has consented to take the risk of that harm.

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

For commentary on the doctrine of consent, as stated in ss. 87–92 of the Code, see Part II., ss. 190–197, and the special references appended to the following sections.

Act not intended to cause death, done by consent in good faith for the benefit of a person.

88. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z with Z's consent. A has committed no offence.

For commentary on ss. 88, 91, see Part II., s. 193.

Act done in good faith for the benefit of a child or person of unsound mind, by or by consent of guar-

89. Nothing, which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely cause, to that person: Provided—

First.—That this exception shall not extend to intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the betment of any offence, to the committing of which ffence it would not extend.

Illustration.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

For commentary on s. 89, see Part II., s. 196.

Consent known to be given under fear or misconception.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception—Or,

Consent of a child or person of unsound mind.

If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

For commentary on s. 90, see Part II., ss. 194, 195.

Acts which are offences independently of harm caused to the person consenting, are not within the exceptions in sections 87, 88, and 89.

91. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm;" and the consent of the woman, or of her guardian, to the causing of such miscarriage does not justify the act.

Act done in good faith for the benefit of a person without consent.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable

of giving consent, and has no guardian, or other person in lawful charge of him, from whom it is possible to obtain consent in time for the thing to be done with benefit. Provided—

Provisoes.

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment of any offence, in the committing of which offence it would not extend.

Illustrations.

(*a*) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(*d*) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here even if the child is killed by the fall, A has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

For commentary on s. 92, see Part II., s. 197.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Communication made in good faith.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Commentary.

Section 93 was intended by the Commissioners to guard against a possibility which their ingenuity foresaw, though it is hardly likely ever to become a reality. The words of s. 299 are so wide, that a person might commit the offence of culpable homicide by suddenly communicating disastrous intelligence to a person whose state of health was such that the shock might readily prove fatal. It seemed to the Commissioners that the section ought not to be altered so as to exclude such an act from the list of offences; because, if a person maliciously, and for the purpose of killing or injuring another, imparted a shock of this species, the act was as truly criminal as if a tangible weapon had been used. Section 93 was therefore introduced to protect the innocent, without unduly cloaking the guilty. When we remember, however, that the words "good faith" imply due care and attention; and that it is expressly stipulated that the communication shall be made for the benefit of the person to whom it is addressed, it may be doubted whether the danger, supposing any existed, is much diminished. (See 1st Report, 1846, ss. 243-249.)

94. Except murder, and offences against the State, punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Act to which a person is compelled by threats.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person, seized by a gang of dacoits,

and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools, and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

For commentary on s. 94, see Part II., ss. 198–201.

Act causing slight harm.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Commentary.

This is a novel, but a useful section. It is plain that the "person of ordinary sense and temper" must be taken from the class to which the actual complainant belongs. Gross language, and even personal violence, may be so common among members of a particular class of the community, that such acts may be done by one to another without any idea that any just ground for complaint is given. Similar acts in a different rank of life might necessarily exhibit an intention to insult and injure. The section is valuable as allowing the Judge a means of evading the strict letter of the law, whenever merely litigious charges are brought under such sections as 294, 295, 499, 503, etc.

The original framers of the Code in their notes (p. 81) say of this clause, that it

"Is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and are for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen into another man's ink; mischief to crumble one of his wafers; an assault to cover him with a cloud of dust by riding past him; hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society—acts which all men constantly do and suffer in turn, and which it is desirable they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice."

For instance, the High Court of Bombay reversed a conviction for theft under this section, where the accused was sentenced to seven days' imprisonment for picking pods, value 3 pie, off a tree standing in a waste piece of Government land. (Reg. *v.* Kalya, 5 Bom. H.C. Cr.C. 35.) The case might have been different had the produce been taken from a tree on the property of a private person.

This section, however, was held not to apply to a blow across the chest with an umbrella, though such blow may have caused but little pain (Government of Bengal *v.* Sheo Gholam, 24 Suth. Cr. 67); or to

the tearing up of a paper which showed a money debt due from the defendant to the prosecutor, though it was unstamped, and therefore not a legal security. (Reg. *v.* Ramasami, 12 Mad. 148.)

Of the Right of Private Defence.

For commentary on the Right of Private Defence, see Part II., ss. 202-227, and the special references appended to the following sections.

Nothing done in private defence is an offence.

96. Nothing is an offence which is done in the exercise of the right of private defence.

Right of private defence of the body and of property.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body and the body of any other person, against any offence affecting the human body.

Secondly.—The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.

For commentary on s. 97, see Part II., ss. 202, 215, 225, 277.

Right of private defence against the act of a person of unsound mind, etc.

98. When an act, which would otherwise be a certain offence, is not that offence by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations.

(*a*) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(*b*) A enters by night a house which he is legally entitled to enter. Z in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A, under this misconception, commits no offence. But A

has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

Acts against which there is no right of private defence.

99. *First.*—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

Second.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

For commentary on s. 99, cl. 1, 2, see Part II., ss. 204–214 and 227.

Third.—There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

For commentary on cl. 3, see Part II., s. 203, 216.

Extent to which the right may be exercised.

Fourth.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

For commentary on cl. 4, see Part II., s. 217.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority if demanded.

For commentary on these explanations, see Part II., s. 204.

When the right of private defence of the body extends to causing death.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault—

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault—

Thirdly.—An assault with the intention of committing rape—

Fourthly.—An assault with the intention of gratifying unnatural lust—

Fifthly.—An assault with the intention of kidnapping or abducting—

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

For commentary on s. 100, see Part II., ss. 216, 221.

When such right extends to causing any harm other than death.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

For commentary on s. 101, see Part II., s. 217.

Commencement and continuance of the right of private defence of the body.

102.—The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

For commentary on s. 102, see Part II., s. 223.

When the right of private defence of property extends to causing death.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely—

First.—Robbery.

Secondly.—House-breaking by night.

Thirdly.—Mischief by fire committed on any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly.—Theft, mischief, or house-trespass under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

For commentary on s. 103, see Part II., ss. 218, 221.

When the right extends to causing any harm other than death.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

For commentary on s. 104, see Part II., ss. 219, 220.

Commencement and continuance of the right of private defence of property.

105. *First.*—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Second.—The right of private defence of property against theft continues till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.

Third.—The right of private defence of property against robbery continues as long as the offender causes or attempts

to cause to any person death, or hurt, or wrongful restraint, or as long as the fear of instant death, or of instant hurt, or of instant personal restraint continues.

Fourth.—The right of private defence of property against criminal trespass, or mischief, continues as long as the offender continues in the commission of criminal trespass or mischief.

Fifth.—The right of private defence of property against house-breaking by night, continues as long as the house-trespass which has been begun by such house-breaking continues.

For commentary on s. 105, see Part II., s. 224.

Right of private defence against a deadly assault when there is risk of harm to an innocent person.

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if, by so firing, he harms any of the children.

CHAPTER V.

OF ABETMENT.

For commentary on abetment, see Part II., Chap. IV., ss. 233-242, and special references to following sections.

Abetment of a thing.

107. A PERSON abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

commentary, see Part II., ss. 233-235.

Secondly.—Engages with one or more other person, or persons, in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

For commentary, see Part II., ss. 236, 237.

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

For commentary, see Part II., ss. 238, 239.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact, and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Abettor.

108. A person abets an offence who abets either the commission of an offence, or the commission of an act, which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence, although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(*a*) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(*b*) A instigates B to murder D. B, in pursuance of the instigation, stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations.

(*a*) A, with a guilty intention, abets a child, or a lunatic, to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(*b*) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act, and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is, therefore, subject to the punishment of death.

(*c*) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for the offence.

(*d*) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy, that the abettor

should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Illustration.

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poisons; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has, therefore, committed the offence defined in this section, and is liable to the punishment for murder.

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment.

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Commentary.

The definition of offence under the amending Act XXVII. of 1870 (see *ante*, s. 40) now includes offences against special and local laws. It does not, however, include offences against the law of England. Therefore, where the principal offender is punishable only under that law, as, for instance, for an offence against the common law committed on the High Seas, he is not punishable under s. 109 for the offence of conspiring in India to commit that offence. (Reg. *v.* Elmstone, 7 Bom. H.C. C.C. 116.) When the principal offender is punishable under a special English Statute, such Statute might perhaps be held to be "a special law," and, if so, he would be punishable for abetment of the offence in India. (See 7 Bom. H.C. C.C. 118.) In the case of Elmstone and others who were indicted for having conspired in Bombay to cause the destruction of a vessel on the High Seas, the indictment being before the passing of Act XXI. of 1879 (Foreign Jurisdiction), it was held that they were not punishable under the Penal Code. Marks, the principal offender, was convicted under 24 & 25 Vict., c. 97, s. 42 (Malicious injury to property); Elmstone was convicted as an accessory before the fact under 9 Geo. IV., c. 74, s. 7 (Criminal Justice Improvement), which provides that the offence of the accessory may be inquired of, tried, and determined by any Court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the High Seas. (7 Bom. H.C. C.C. 130.)

Explanation.—An act or offence is said to be committed

in consequence of abetment, when it is committed in consequence of instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations.

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in s. 161.

(*b*) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(*c*) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here, B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

For commentary upon ss. 109–113, see Part II., ss. 240–242.

Punishment of abetment if the person abetted does the act with a different intention from that of the abettor.

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor, and with no other.

Liability of abettor when one act is abetted and a different act is done.

Proviso.

111. When an act is abetted and a different act is done, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it; provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations.

(*a*) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner, and to the same extent, as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house, and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the

theft; for the theft was a distinct act, and not a probable consequence of the burning.

A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

Abettor when liable to cumulative punishment for act abetted and for act done.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

Abettor for an effect caused by the act abetted different [illegible]

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

Abettor present when offence is committed.

114. Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

115. Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine; and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to a fine.

Abetment of an offence punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.

If an act which causes harm be done in consequence of the abetment.

Illustration.

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years, and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for that offence or with both.

Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.

If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.

Illustrations.

(*a*) A offers a bribe to B, a public servant, as a reward for showing

A some favour in the exercise of B's official functions. B refuses to accept the bribe; A is punishable under the section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) A, a Police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a Police officer, whose duty is to prevent that offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

Commentary.

Where a man abetted the Civil Surgeon of a Sudder station in an offence punishable under s. 161, it was held he could not receive the enhanced punishment under the latter part of s. 116, as the surgeon was not a "public servant" within this section. (Reg. *v.* Ramnath, 21 Suth. Cr. 9.)

Abetting the commission of an offence by the public, or by more than ten persons.

117. Whoever abets the commission of an offence by the public generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration.

A affixes in a public place a placard, instigating a sect consisting of more than ten members to meet at a certain time and place for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

Commentary.

This section does not apply to cases where each of the persons abetted commits a distinct and separate offence; *e.g.* where the prisoner induced twelve coolies each to break his contract. (3 Suth. Cr. Letters, 24.)

Concealing a design to commit an offence punishable with death or transportation for life.

118. Whoever, intending to facilitate, or knowing it to be likely that he will thereby facilitate, the commission of an offence punishable with death or transportation for life, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation

which he knows to be false respecting such design shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and, in either case, shall also be liable to fine.

If the offence be committed.

If the offence be not committed.

Illustration.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under the section.

For commentary on ss. 118–120, see Part II., ss. 243–245.

119. Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence, the commission of which it is his duty, as such public servant, to prevent, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both; or if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years; or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

A public servant concealing a design to commit an offence which it is his duty to prevent.

be

If the offence be punishable with death, etc.

If the offence be not committed.

Illustration.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence.

Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

Concealing a design to commit an offence punishable with imprisonment.

If the offence be committed.

If not committed.

120. Whoever intending to facilitate, or knowing it to be likely that he will thereby facilitate, the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

For commentary on this chapter, see Part II., Chap. V., ss. 260–281, and special references to following sections.

Waging or attempting to wage war, or abetting the waging of war against the Queen.

121. WHOEVER wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall forfeit all his property.

Illustrations.

(*a*) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(*b*) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

For commentary on this section, see Part II., ss. 264–271.

Conspiracy to commit offences punishable by section 121.

121A. Whoever, within or without British India, conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal

force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years.

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof. (Act XXVII. of 1870, s. 4.)

For commentary on this section, see Part II., ss. 272-276.

Collecting arms, etc., with the intention of waging war against the Queen.

122. Whoever collects men, arms, or ammunition, or otherwise prepares to wage war, with the intention of either waging, or being prepared to wage war against the Queen, shall be punished with transportation for life, or imprisonment of either description, for a term not exceeding ten years, and shall forfeit all his property.

Concealing with intent to facilitate a design to wage war.

123. Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary, see Part II., ss. 243-246.

Assaulting Governor-General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.

124. Whoever with the intention of inducing, or compelling, the Governor-General of India, or the Governor of any Presidency, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any Presidency, to exercise, or refrain from exercising, in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor, or Member of Council, assaults, or wrongfully restrains, or attempts wrongfully to restrain, or overawes by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

124A. Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Exciting disaffection.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause. (Act XXVII. of 1870, s. 5.)

For commentary on this section, see Part II., ss. 277–281.

125. Whoever wages war against the Government of any Asiatic power in alliance, or at peace, with the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added; or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

Waging war against any Asiatic power in alliance with the Queen.

126. Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance, or at peace, with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation.

Committing depredation on the territories of any power at peace with the Queen.

127. Whoever receives any property, knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall

Receiving property taken by war or depredation mentioned in sections 125 and 126.

also be liable to fine, and to forfeiture of the property so received.

Public servant voluntarily allowing Prisoner of State or War in his custody to escape.

128. Whoever, being a public servant, and having the custody of any State Prisoner or Prisoner of War, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Public servant negligently suffering Prisoner of State or War in his custody to escape.

129. Whoever, being a public servant, and having the custody of any State Prisoner or Prisoner of War, negligently suffers such prisoner to escape from any place of confinement, in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

Commentary.

According to English law it would seem that the mere fact of an escape is *primâ facie* evidence of negligence on the part of the keeper. For it is his duty to keep the prisoner safely. But this may be negatived on the part of the defendant, by showing force, or other circumstances, which rebut the presumption. (1 Hale, P. C. 601.) No presumption, however, can be raised from the mere fact of an escape that it was voluntarily permitted, or that it was knowingly aided or assisted; and express evidence must be brought to this effect, if any conviction under s. 128 or s. 130 is desired.

Aiding escape, or rescuing, or harbouring such prisoner.

130. Whoever knowingly aids, or assists, any State Prisoner, or Prisoner of War, in escaping from lawful custody, or rescues, or attempts to rescue, any such prisoner, or harbours or conceals any such prisoner, who has escaped from lawful custody, or offers, or attempts to offer, any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State Prisoner, or Prisoner of War, who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

For commentary on ss. 128–130, see Part II., ss. 247–251.

The following chapters of the Code, namely, IV. (*General Exceptions*), V. (*Of Abetment*), and XXIII. (*Of Attempts to commit Offences*), shall apply to offences punishable under the said ss. 121A, 294A, and 304A, and the said Chapters IV. and V. shall apply to offences punishable under the said ss. 124A and 225A. (Act XXVII. of 1870, s. 13.)

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

Abetting mutiny, or attempting to seduce a sailor, or soldier, from his duty.

131. WHOEVER abets the committing of mutiny by an officer, soldier, or sailor, in the Army or Navy of the Queen, or attempts to seduce any such officer, soldier, or sailor from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—In this section, the words "officer" and "soldier" include any person subject to the Articles of War for the better government of Her Majesty's Army, or to the Articles of War contained in Act No. V. of 1869 (Indian Articles of War). (Act XXVII. of 1870, s. 6.)

Abetment of mutiny, if mutiny is committed in consequence thereof.

132. Whoever abets the committing of mutiny by an officer, soldier, or sailor, in the Army or Navy of the Queen, shall, if mutiny be committed in consequence of that abetment, be punished with death, or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment of an assault by a soldier, or sailor, on his superior officer, when in the execution of his office.

133. Whoever abets an assault by an officer, soldier, or sailor, in the Army or Navy of the Queen, on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and

134. Whoever abets an assault by an officer, soldier, or sailor, in the Army or Navy of the Queen, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Abetment of such assault, if the assault is committed.

135. Whoever abets the desertion of any officer, soldier, or sailor, in the Army or Navy of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Abetment of the desertion of a soldier or sailor.

136. Whoever, except as hereinafter excepted, knowing, or having reason to believe, that an officer, soldier, or sailor, in the Army or Navy of the Queen, has deserted, harbours such officer, soldier, or sailor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Harbouring a deserter.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

For commentary on s. 136, see Part II., ss. 247-251.

137. The master, or person in charge, of [illegible]ant vessel, on board of which any [illegible]from the Army or Navy of the [illegible]con- cealed, shall, though ignorar[illegible]con- cealment, be liable to a pena[illegible]eding five hundred rupees, if he m[illegible]known of such concealment but for some negle[illegible]uty as such master or person in charge, or but [illegible]ant of discipline on board of the vessel.

Deserter concealed on board merchant vessel through negligence of master.

138. Whoever abets what he knows to be an ac[illegible] ordination by an officer, soldier, o[illegible] the Army or Navy of the Queer[illegible] such act of insubordination be com[illegible] consequence of that abetment, be [illegible] of either description for a teri[illegible]

Abetment of act of insubordination by a soldier or sailor.

139. No person subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment under this Code for any of the offences defined in this chapter.

Persons subject to Articles of War not punishable under this Code.

140. Whoever, not being a soldier in the Military or Naval service of the Queen, wears any garb, or carries any token resembling any garb or token used by such a soldier, with the intention that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Wearing the dress of a soldier.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

For commentary on this chapter, see Part II., ss. 282–295, and special references to the following sections.

141. AN assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly, is—

Unlawful assembly.

First.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any Public Servant, in the exercise of the lawful power of such Public Servant; or,

For commentary, see Part II., s. 285.

Second.—To resist the execution of any law, or of any legal process; or,

For commentary, see Part II., s. 286.

Third.—To commit any mischief or criminal trespass, or other offence (see s. 40, *ante*); or,

For commentary, see Part II., s. 287.

Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

For commentary, see Part II., ss. 288-290.

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

For commentary, see Part II., s. 291.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

Being a member of an unlawful assembly.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

For commentary on this section, see Part II., s. 283.

Punishment.

143. Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to *six months, or with fine, or with both.*

Joining an unlawful assembly armed with any deadly weapon.

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining, or continuing in, an unlawful assembly, knowing that it has been commanded to disperse.

145. Whoever joins, or continues in, an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

146. Whenever force, or violence, is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Force used by one member in prosecution of common object.

For commentary, see Part II., s. 292.

147. Whoever is guilty of rioting shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for rioting.

148. Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Rioting, armed with a deadly weapon.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Every member of an unlawful assembly to be deemed guilty of any offence committed in prosecution of common object.

For commentary, see Part II., s. 292.

150. Whoever hires, or engages, or employs, or promotes, or connives at the hiring, engagement, or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement, or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

Hiring, or conniving at hiring, of persons to join an unlawful assembly.

151. Whoever knowingly joins, or continues in, any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.

Explanation.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

For commentary, see Part II., ss. 293, 294.

152. Whoever assaults, or threatens to assault, or obstructs, or attempts to obstruct, any public servant in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use, criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assaulting, or obstructing, public servant when suppressing riot, etc.

153. Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person, intending, or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Wantonly giving provocation, with intent to cause riot.

If rioting be committed.

If not committed.

See Reg. *v.* Kahangi, 18 Bom. 578.

154. Whenever any unlawful assembly or riot takes place the owner, or occupier, of the land upon which such unlawful assembly is held, or such riot is committed, and any person having, or claiming, an interest in such land,

Owner, or occupier, of land of which an unlawful assembly is held.

shall be punishable with fine not exceeding one thousand rupees, if he, or his agent, or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his, or their, power to the principal officer at the nearest Police station, and do not, in the case of his, or their, having reason to believe that it was about to be committed, use all lawful means in his, or their, power to prevent it, and, in the event of its taking place, do not use all lawful means in his, or their, power to disperse, or suppress, the riot or unlawful assembly.

Commentary.

The knowledge of the owner or occupier in cases of this kind is immaterial. He is liable for the acts of commission and the acts of omission, not only of himself, but of his agent or manager (*per curiam*, Reg. *v.* Payag Singh, 12 All. 550).

Liability of person for whose benefit a riot is committed.

155. Whenever a riot is committed for the benefit, or on behalf, of any person who is the owner, or occupier, of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted, or derived, any benefit therefrom, such person shall be punishable with fine, if he, or his agent, or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his, or their, power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Liability of agent of owner or occupier, for whose benefit a riot is committed.

156. Whenever a riot is committed for the benefit, or on behalf, of any person who is the owner, or occupier, of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted, or derived, any benefit therefrom, the agent, or manager, of such person shall be punishable with fine, if such agent, or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to

prevent such riot or assembly from taking place, and for suppressing and dispersing the same.

Commentary.

In order to convict a manager under this section, it must be shown by legal evidence, (1) that a riot as defined in the Penal Code was committed; (2) that the riot, if committed, was committed for the benefit of the owner or occupier of the land which the defendant was managing; and (3) that the accused had reason to believe that a riot was likely to be committed. (Brae *v.* Reg., 10 Cal. 338.)

Harbouring persons hired for an unlawful assembly.

157. Whoever harbours, receives, or assembles, in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged, or employed, or are about to be hired, engaged, or employed, to join, or become members of, an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

For commentary, see Part II., ss. 247–251.

Being hired to take part in an unlawful assembly or riot.

Or to go armed.

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do, or assist in doing, any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both; and whoever, being so engaged, or hired, as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Affray.

159. When two or more persons, by fighting, in a public place, disturb the public peace, they are said to "commit an affray."

For commentary, see Part II., s. 295.

160. Whoever commits an affray shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161. WHOEVER being, or expecting to be, a public servant, accepts or obtains, or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing, or forbearing to do, any official act, or for showing, or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering, or attempting to render, any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant taking a gratification other than legal remuneration, in respect of an official act.

Explanations.—"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

"Gratification." The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government which he serves to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(*a*) A, a Moonsiff, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(*b*) A, holding the office of Resident at the Court of a subsidiary power, accepts a lakh of rupees from the Minister of that power. It does not appear that A accepted this sum as a motive or reward for doing, or forbearing to do, any particular official act, or for rendering, or attempting to render, any particular service to that power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that power. A has committed the offence defined in this section.

(*c*) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

Commentary.

The offence constituted by this section consists simply in the act of receiving, or trying to obtain (Empress *v.* Baldeo, 2 All. 253) a bribe, or that which is intended as a bribe, although nothing illegal is done, or nothing is illegally omitted in consequence. The receipt of a present from the friends of a prisoner, who was sentenced to be hung the next hour, would still be criminal, if taken as a motive or reward for doing, or forbearing to do, any official act, for which a reward cannot lawfully be taken. Of course it must be taken with this view. It will not be necessary that the person who receives the present should intend to carry out the purpose for which it is given. If it is given with corrupt intention, and he receives and appropriates it, knowing of that intention, the offence is complete. Indeed, the presumption of guilty knowledge would be so great, that it is hardly possible to conceive a case in which a public official could innocently take any present from a person who was mixed up in any public business connected with his department. Under s. 165 the mere fact of accepting presents amounts to an offence, independently of the motive of either giver or receiver. (Empress *v.* Kampta, 1 All. 530.)

A person who in *fact*, though wrongly, discharges the duties of an office whereby he is apparently a public servant, may be tried for accepting an illegal gratification. (Reg. *v.* Ram Kristna, 7 B.L.R. 446; S.C. 16 Suth. Cr. 27.)

162. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do, or to forbear to do, any official act, or in the exercise of the official functions of such public servant to show favour, or disfavour, to any

Taking a gratification, in order, by corrupt or illegal means, to influence a public servant.

person, or to render, or attempt to render, any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Taking a gratification for the exercise of personal influence with a public servant.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do, or to forbear to do, any official act, or in the exercise of the official functions of such public servant to show favour, or disfavour, to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

An Advocate who receives a fee for arguing a cause before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust—are not within this section, inasmuch as they do not exercise, or profess to exercise, personal influence.

Punishment for ..betment by public servant of the offences above defined.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.

Illustrations.

(*a*) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(*b*) A, a Judge, buys of Z, who has a cause pending in A's Court, Government Promissory Notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(*c*) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

Commentary.

By Stat. 13 Geo. III., c. 63, ss. 23–25, and 33 Geo. III., c. 52, s. 62, the receiving of gifts by the Governor-General, or any Member of the Council of Fort William, or by any of the Judges of the Supreme Court of Calcutta, or by any person holding any office under the Crown or the East India Company, is forbidden, and is punishable as extortion, and as a misdemeanour at law. But this is not to prevent lawyers, physicians, or chaplains from accepting professional fees and rewards.

A Police officer who, after a case of theft had been decided in favour of the prosecutor, asked him for and received from him part of the proceeds of the theft which had been returned to him by order of the Court, was held to have committed an offence under this section and not under s. 161. (Empress *v.* Kampta, 1 All. 530.)

166. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant disobeying a direction of the law, with intent to cause injury to any person.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section. (See Miller *v.* Knox, 4 Bing. N.C. 574; Atty.-Gen. *v.* Kissane, 32 Ir. L.R. C.L. 220, Part II., ss. 83, 84.)

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows, or believes, to be incorrect, intending thereby to cause, or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant framing an incorrect document with intent to cause injury.

Commentary.

Sections 162 and 163 only apply to cases where the party who is to exercise corrupt or undue influence does so for a consideration, obtained from a third person. If he does so without receiving any gratification, to serve his own private interests, or for the benefit of another, whether voluntarily or upon solicitation, no offence will have been committed under these sections. If guilty at all, he can only be guilty as an abettor. It will follow, therefore, that if the act done is not an offence in the public servant, it is no offence in the person who instigates him to it. Hence, a person who of his own accord, or without being himself bribed, offers any gratification whatever to a public servant will be punishable as an abettor of the offence in s. 161. So, if being in any way connected with the official functions of a public servant, he induces him to accept anything for an inadequate consideration, he will have abetted the offence in s. 165. But it is no offence in a public servant to yield to a mere personal influence, not accompanied by what is styled in s. 161 a gratification, unless by so doing he transgresses s. 166, or s. 217.

Hence, if the friend of a party to a civil suit were by personal influence to induce a Moonsiff to give judgment against the defendant,

contrary to his own conviction, the Moonsiff would be guilty under s. 166, and the party who persuaded him would be guilty as an abettor. So, if the successful solicitations were addressed to a Sessions Judge, who acquitted a prisoner in consequence, the Judge will be guilty under s. 217, and the person who exercised influence as an abettor. But the exercise of, or yielding to, personal influence in the disposal of patronage, the conferring of rewards for service, the granting of contracts, or the like, would be no offence in either of the parties concerned. If, however, the suitor were to resort to threats instead of entreaties, this would be an offence under s. 189.

The personal influence referred to in s. 163 seems to mean that influence which one man possesses over another, irrespectively of the merits of the case upon which it is brought to bear. Such considerations as rank, wealth, power, gratitude, relationship, or affection may induce a person to grant to the request of one man what he would not to the request of the other. But influence exercised solely upon the merits of the case would seem not to be personal influence. If a person who was about to pay a visit to a Collector were to accept a sum of money, on the understanding that he was to draw the Collector into conversation upon the case, and represent it fully to him, such a proceeding, however indelicate and improper, would, I conceive, not come under s. 163, provided no personal feeling was brought into play.

Under s. 167 it would be no offence if a Court Translator employed in a criminal case were to mistranslate all the documents for the purpose of procuring the acquittal of the prisoner, though it would be otherwise if he had the contrary motive. Such a case would probably come under s. 218, though the omission of the express words used in s. 167 might make the point doubtful, and it is expressly stated as coming under the head of False Evidence (s. 191, Illustration *e*). Where the mistranslation is done intentionally, and does produce injury, it will not be necessary to show intention to injure, or knowledge that injury would follow. As Lord *Mansfield* says,

"Where an act, in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found: but when the act is of itself unlawful, that is *primâ facie* and unexplained, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." (5 Burr. 2667.)

168. Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant unlawfully engaging in trade.

Commentary.

By 33 Geo. III., c. 52, s. 137, it is rendered unlawful for any Governor-General, or Governor, or any Member of Council of any of the Presidencies of India, or for any Collector, Supervisor, or other

person employed or concerned in the collection of the revenues, or the administration of Justice, in the provinces of Bengal, Behar, or Orissa, or for their agents or servants, or any one in trust for them; or for any of the Judges of the Supreme Court of Judicature, to be concerned in any trade or traffic whatever, whether within or without India. (See also 3 & 4 Wm. IV., c. 85, s. 76.) Under Madras Reg. I. of 1803, s. 40, Members of the Board of Revenue are forbidden to be concerned in trade, commerce, or houses of agency, or in direction or management of banks, or in transactions for borrowing or lending money with native officers under the Revenue Department, or with Zemindars, proprietors of land, renters, or other persons responsible for the revenue. Under Reg. II. of 1803, s. 64, Collectors, and Assistants to Collectors, are forbidden to exercise or carry on trade or commerce, directly or indirectly, or to be engaged in any bank or house of agency. Nor may they be concerned in the farming of the public revenue, or in the lending of money to proprietors of land, renters, or persons responsible for the public revenue, or in any way connected with its management. (*Ibid.*, ss. 60 and 61.) By 37 Geo. III., c. 142, s. 28, the lending of money or any valuable thing by a British subject to a Native Prince is made a misdemeanour. Here, British subject is used in its restricted sense.

Act XV. of 1848 (Supreme Courts: Officers) forbids officers of the Supreme Courts in India, or of the Courts for the Relief of Insolvent Debtors, to carry on any dealings as banker, trader, agent, factor, or broker, either for their own advantage, or for the advantage of any other person, except such dealings as it may be part of their duty to carry on.

169. Whoever, being a public servant, and being legally bound, as such public servant, not to purchase, or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

Public servant unlawfully buying or bidding for property.

Commentary.

A Police officer who purchases a pony which has been impounded may be proceeded against under this section, and s. 19 of Act I. of 1871 (Cattle Trespass). (Reg. *v.* Ramkrishna, 8 B.L.R., App. i.; S.C. 16 Suth. Cr. 62. See also Crim. P. C., s. 559, as enacted by Act X. of 1886, s. 16.)

By s. 292 of the Civil Procedure Code, it is provided that no officer having any duty to perform in connection with any sale under Chapter XIX. of that Code, shall either directly or indirectly bid for, acquire, or attempt to acquire, any interest in any property sold at such sale.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Personating a public servant.

171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Wearing garb, or carrying token used by public servant with fraudulent intent.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172. WHOEVER absconds in order to avoid being served with a summons, notice, or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice, or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Absconding to avoid service, or summons, or other proceeding from a public servant.

Commentary.

It has been held in Bengal that a person absconding to avoid a warrant issued by a Magistrate against him is not punishable under s. 172. (*Acc.* Mad. H.C. Rul., 21st April, 1866; S.C. Weir, 25 [33]

Reg. *v.* Amir Jan, 7 N.W.P. 302.) The warrant is neither a summons nor a notice, and the order which it contains is addressed to the officer and not to the person whose attendance is required. The course is to proceed under ss. 81 and 163 of the Crim. P. C. of 1882. Disobedience to the proclamation issued under Crim. P. C., s. 81, would be punishable under s. 147 of the Penal Code. (Reg. *v.* Womesh, 5 Suth. Cr. 71; Reg. *v.* Hossein, 9 Suth. Cr. 70.)

In order to make out the commission of an offence under this section, it is necessary to show that a summons, notice, or order has been issued, and that the absconder knew, or a least had reason to believe, that process had issued. It is not sufficient to show that a person apprehending that a process will be issued has absconded. But the term "abscond" is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and ordinary sense are to hide one's self; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person having concealed himself before process issues, continues to do so after it has issued, he absconds. (Per *Turner*, C.J., Srinavasa Ayyanger *v.* the Queen, 4 Mad. 393, 397.)

Preventing service of summons or other proceeding, or preventing publication thereof.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice, or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice, or order, or intentionally prevents the lawful affixing to any place of any such summons, notice, or order, or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed, or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order, or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Commentary.

The refusal to receive or to sign a summons does not constitute the offence of intentionally preventing the service of a summons upon himself under the above section. (Reg. *v.* Punamallai Nadan, 5 Mad. 199; Reg. *v.* Kalya, 5 Bom. H.C. C.C. 34; Reg. *v.* Bhoobuneshwar, 3 Cal. 621; Reg. *v.* Krishna Gobinda, 20 Cal. 358.)

Non-attendance in obedience to an order from a public servant.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the summons, notice, order, or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations.

(*a*) A, being legally bound to appear before the Supreme Court at Calcutta, in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(*b*) A, being legally bound to appear before a Zillah Judge as a witness, in obedience to a summons issued by that Zillah Judge, intentionally omits to appear. A has committed the offence defined in this section.

Commentary.

Under the three preceding sections the offence depends upon the legal competence of the officer to issue the summons, etc. (Reg. *v.* Purshotam, 5 Bom. H.C. C.C. 33.) Therefore the High Court of Madras has held, that disobedience to a summons issued by a Tahsildar in his revenue capacity, or by a Village Magistrate in respect to an offence over which he had no jurisdiction, was not punishable. (Rulings of 1864 and 1865, on s. 174; S.C. Weir, 25 [38–44]; Reg. *v.* Varathappa Chetty, 12 Mad. 297.) Now, however, revenue officers in the Madras Presidency have received power to issue such summonses (Madras Act III. of 1869; see 6 Mad. H.C., App. xliv.; 7 *ib.* App. x., xi.), but no offence is committed by disobedience unless the summons has been issued in the special cases authorized by the Act. (Reg. *v.* Varathappa Chetty, 12 Mad. 297.) Magistrates who have jurisdiction over the offence, may issue summonses to witnesses beyond their own local limits. (3 Mad. H.C., App. v.) No witness is bound to appear to a summons at any place outside British India. (Reg. *v.* Paranga, 16 Mad. 463.) Under s. 174 it is further necessary that the party should be legally bound to obey the summons. This obligation would, in general, follow as a necessary consequence from the competence of the officer to issue the order. But cases might arise in which there would be no such obligation. For instance, a witness, already in attendance

at one Court, would be under no obligation to go to a Court at a distance, until he had given his evidence in the case for which he has been first cited. In Reg. *v.* Sutherland (14 Suth. Cr. 20) it was held that a witness who attended in obedience to a summons at a certain hour was not bound to wait all day in Court, and that if he went away after a reasonable time, he could not be convicted under this section. It may be doubted, however, whether a witness would not be bound to wait so long as there was reason to believe that the case in which he was summoned would come on, and his evidence be taken. In a Bombay case a Magistrate summoned the defendant to appear before him at 10 a.m.; the accused attended punctually, the Magistrate was detained by public business; after waiting a few minutes the defendant went away. It was held that he was properly convicted under s. 174. (Reg. *v.* Kisan Bapu, 10 Bom. 93.)

In order to sustain a charge under s. 174 for disobedience to a summons issued by a Civil Court, it is necessary to prove personal service of the summons in accordance with the provisions of the Civil Procedure Code. (Reg. *v.* Hury Nath, 7 Suth. Cr. 58; Reg. *v.* Sreenath, 10 Suth. Cr. 33.) And, therefore, where a summons was not served personally on the defendant, but affixed to the door of his house, and he failed to attend, it was held that he had committed no offence. (6 Mad. H.C., App. xxiv.) A merely verbal order given at any stage of a trial to a person already summoned, directing him to return on a specified day to which the hearing is adjourned, is a sufficient notice to entail the penalties of this section for non-attendance. (5 *ibid.*, xv.; and see 7 *ibid.*, iii.) But it would be otherwise if the order was a general one to appear again when required, no particular day being named (6 *ibid.*, x.; Empress *v.* Ram Saran, 5 All. 7); and an adjournment of a trial by public proclamation is irregular and objectionable. Special notification should be given to all parties concerned of the date of the adjourned hearing. (6 Mad. H.C., App. xxx.) The summons must also specify the place at which the person summoned is to attend. If it fail to do so, the conviction for disobedience would be illegal. (7 *ibid.*, xiv.; Mad. H.C. Rul., 9th Dec., 1876; S.C. Weir, 31 [44]; Empress *v.* Ram Saran, 5 All. 7.) A summons may be made returnable on a Sunday, in the Mofussil. (4 Mad. H.C., App. lxii.; see Weir, footnote, p. 30 [43]; Mad. H.C. Rul., 14th Aug., 1872; S.C. Weir, 29 [43].)

A person failing to obey the summons of a Coroner is liable to conviction under this section or s. 176. (Act IV. of 1871, s. 17: Coroners.)

This section has been held not to apply to an escape from custody under a warrant in execution of the decree of a Civil Court. (Reg. *v.* Sirdar Pathoo, 1 Bom. H.C. 38; 7 Mad. H.C., App. xlii.) It does apply to the case of a defendant in a criminal case who had given bail for his appearance, and had also entered into his own personal recognizance. It was held to be no objection to a charge under s. 174 that his surety had already been made to pay in default of his appearance, and that he himself was liable to have his own recognizance forfeited under s. 219 of the Crim. P. C. of 1861, corresponding with s. 514 of the present Code. (Reg. *v.* Tajamaddi, 1 B.L.R.A. Cr. 1; S.C. 10 Suth. Cr. 4.)

A Magistrate cannot himself try a case under this section for disobedience to his own summons. The procedure to be adopted is

that laid down in s. 476 of the Crim. P. C., 1882. Except in the cases provided for by ss. 477, 480, 585, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in the Crim. P. C., s. 195, when such offence is committed before himself, or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding. (Crim. P. C., s. 487; Reg. *v.* Sheshayya, 13 Mad. 24; Reg. *v.* Chandra Sekhar, 5 B.L.R. 100; S.C. 13 Suth. Cr. 66; Reg. *v.* Sukhari, 2 All. 405.) A conflicting decision in Bengal (Reg. *v.* Ramlochun Singh, 18 Suth. Cr. 15) is founded upon a mistaken application of a Full Bench decision of the same Court (Reg. *v.* Hira Lall, 8 B.L.R. 422; S.C. 17 Suth. Cr. 39), which was expressly rested on the special wording of the Registration Act XX. of 1866, s. 95.

175. Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Omission to produce a document to a public servant by a person legally bound to produce such document.

Illustration.

A, being legally bound to produce a document before a Zillah Court, intentionally omits to produce the same. A has committed the offence defined in this section.

Commentary.

It is necessary to show that the person was legally bound to produce the document, and if the necessary steps have not been taken to impose that obligation upon him, he does not come under this section. For instance, a witness who intentionally leaves at home a document which he knows will be called for is not punishable, unless the proper notice to produce, or *subpœnâ duces* has been served upon him. There are many documents which a witness may refuse to deliver up, on the ground of their being privileged, but he will still be bound to bring them into Court if they are in his power, and the Court will decide as to the question of privilege. (Act I. of 1872, s. 162, Ind. Evidence.) In the case of State Proceedings, however, the Court cannot even inspect them for the purpose of seeing if they are privileged (*ibid.*) and must take their character upon the word of the public officer who has them in his custody. (Beatson *v.* Skene, 29 L.J. Ex. 430; S.C. 5 H. & N. 838; Hennessy *v.* Wright, 21 Q.B.D. 509 and Act I. of 1872, s. 123.) But the oath of secrecy which is taken by Income Tax officers under the Income Tax Acts does not apply to cases in which they are summoned to give evidence in a Court of Justice (Lee *v.* Birrell, 3

Camp. 337); and *Scotland*, C.J., compelled the production of Income Tax Schedules, though the objection was taken by the officer who appeared. (Reg. *v.* Yakatazkhan, 2nd Madras Sessions, 1863.)

"When any such offence as is described in sections 175, 178, 179, 180, or 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal, or Revenue Court, the Court may cause the offender, whether he be a European British subject or not, to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence, and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid. Nothing in s. 443 or s. 444 (Crim. P. C.) shall be deemed to apply to proceedings under this section. In every such case the Court shall record the facts constituting the contempt, with any statement the offender may make as well as the finding and sentence." If the offence is under s. 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was sitting, and the nature of the interruption or insult offered. (Crim. P. C., ss. 480, 481.) If the Court, in any case, considers that a person accused of any such offence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, it is to proceed under s. 482.

When the Court does not take immediate cognizance of the offence under this section, it must proceed under s. 476, and cannot try the offence itself. (Crim. P. C., s. 487; Reg. *v.* Sheshayya, 13 Mad. 24.)

A Court inflicting a fine for contempt of Court should specially record its reasons and the facts constituting the contempt, so that it may appear whether any contempt of Court was in fact committed. Where, therefore, no such reasons were recorded, the High Court of Madras, on an application made under s. 404 of the Crim. P. C. of 1861 (now s. 439), set aside the order, and directed the fine to be returned (Reg. *v.* Panchanada, 4 Mad. H.C. 229); the Court must also call upon the offender to make any statement he wishes to offer, and must record it. In default of doing so the conviction will be quashed (Kashinath *v.* Daji, 7 Bom. H.C. A.C. 102); and, so, it has been laid down by the Privy Council, in a case where a Barrister had been summarily fined for contempt of Court, "that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him." (*Re* Pollard, L.R. 2 P.C. 106.) The above section (480), which contemplates a statement by the offender, is in accordance with this view.

The High Court, as a Court of Record, can punish summarily for a contempt. (Abdool, *in re*, 8 Suth. Cr. 32.)

It is not a contempt of Court punishable under s. 163 of the old Crim. P. C. (now s. 480) to refuse to sign a deposition given before a Tahsildar in a revenue inquiry. (6 Mad. H.C., App. xiv.)

A Magistrate is not precluded by s. 480 from taking cognizance of a contempt of Court committed in his own presence, unless he thinks that imprisonment without the option of a fine, or a fine of more than two hundred rupees, is demanded by the circumstances of the case. (6 Mad. H.C., App. xvi.)

"When any Court has adjudged an offender to punishment, under s. 480, for refusing or omitting to do anything which he was lawfully required to do,

or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender, or remit the punishment, on his submission to the order or requisition of such Court or on apology being made to its satisfaction." (Crim. P. C., s. 484.)

176. Whoever, being legally bound to give any notice, or to furnish information, on any subject to any public servant, as such, intentionally omits to give such notice, or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or, if the notice or information required to be given respects the commission of an offence (see s. 40, *ante*, p. 13), or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Omission to give notice or information to a public servant by a person legally bound to give notice or information.

Commentary.

For cases in which a person is legally bound to give such information, see Part II., s. 245.

Where a charge under this section is brought against a person falling within s. 45 of the Crim. P. C. for not reporting a case of suspicious death as stated in cl. (*d*), a majority of the Judges in a Bengal case held, that if the body was found on the land, it should be presumed, in the absence of evidence to the contrary, that the death also had occurred there. (Matuki Misser *v.* Reg., 11 Cal. 619.) Where one of several persons bound to give information does in fact give it in proper time, no charge can be preferred under this section against the others for not giving it. The object of the section is to secure the ends of justice, not to compel a race of a number of people to the police office. (Reg. *v.* Gopal Singh, 20 Cal. 316 follg.; Reg. *v.* Sashi Bhusan, 4 Cal. 623.)

The refusal of a person to join in a dacoity of which he says nothing, does not necessarily render him liable to punishment for an intentional omission to give information thereof. (Reg. *v.* Lahai, 7 Suth. Cr. 29; see Reg. *v.* Phool Chand, 16 Suth. Cr. 35; Reg. *v.* Luchman, 18 *ib.* Cr. 22; see Act IV. of 1871, s. 17 (Coroners); *ante*, note to s. 174.)

177. Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to

Furnishing false information.

believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or, if the information which he is legally bound to give respects the commission of an offence (see s. 40, *ante*, p. 13), or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In section 176 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act (Act III. of 1894, s. 5).

Illustrations.

(*a*) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(*b*) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under Clause 5, Section VII., Regulation III. of 1821 of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest Police station, wilfully misinforms the Police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in this section.

Commentary.

The Madras High Court held in a series of cases that the first clause of this section embraces every case in which a subordinate officer attempts to impose false information upon his superior. (Mad. H.C. Rul., 20th Nov., 1862, Weir, 31 [46]; see 6 Mad. H.C., App. xlviii.) For instance, by making a false entry in his official diary that at a particular date he was on duty at a particular place, where in truth he was not. (Virasawmy *v.* the Queen, 4 Mad. 144.) These decisions were, however, overruled in a later case, where the same Court pointed out that, to warrant a conviction, it was necessary to show that the accused was legally bound to give the information, in the manner defined by s. 43, and that a mere breach of departmental rules was not sufficient. (Reg. *v.* Appayya, 14 Mad. 484.) Where a person who wished to be enlisted in the Police, falsely stated that he was not a resident of the district, it was held that he had not committed an

offence under this section or s. 188. (Empress *v.* Dwarda Prasad, 6 All. 97.)

The aggravated penalty constituted by the second clause of the section can only be inflicted, where the information required to be given related to the commission of some particular offence, not of offences generally. (Panatula *v.* Reg., 15 Cal. 386.)

Refusing oath when duly required to take oath by a public servant.

178. Whoever refuses to bind himself by an oath or affirmation (Act X. of 1873, s. 15: Oaths) to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Commentary.

A witness in a Criminal Court, who refuses without reasonable cause, to answer questions put to him, may be committed to custody for seven days, unless in the mean time he consents to answer. If he persists in his refusal, he may be dealt with according to s. 480 or s. 482 of the Criminal Procedure Code, and in the case of a High Court shall be deemed guilty of a contempt. (Cr. P. C., s. 485.)

In a case in England, a father was indicted for an aggravated assault upon his son, and the son refused to give evidence against his father. The Court committed him summarily to prison for one month. (Reg. *v.* Baron Vidil, C.C. Ct., 23rd August, 1861.) Feelings of friendship are not such a "just excuse for refusal" as authorize an individual to obstruct the course of law. Even the relationship of husband and wife is no bar to the admissibility of either in criminal proceedings. (Act I. of 1872, s. 120, Indian Evidence.)

Refusing to answer a public servant authorized to question.

179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Commentary.

A Judge may under s. 165 of the Evidence Act ask a witness a question on an irrelevant fact in order to aid in discovering a relevant fact. But a witness may refuse to answer an irrelevant question, whose only object is to make him inculpate himself. (Reg. *v.* Hari Lakshman, 10 Bom. 185.)

As to the powers of Police officers to require persons, having knowledge bearing upon a crime, to answer questions with a view to preliminary investigation, see Cr. P. C., ss. 160, 161.

Refusing to sign statement.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Commentary.

A person making a deposition in a Revenue inquiry is not bound to sign such deposition, and cannot be punished under this section for refusing to do so. (Mad. H.C. Rul., 18th January, 1870; 6 Mad. H.C., App. xiv.) Nor are statements made to a Police officer in the course of an investigation under Chapter XIV. of the Crim. P. C. other than dying declarations, to be signed by the person making them. (Crim. P. C., s. 162.)

Nor can an accused person who refuses to sign a statement made at his trial in answer to questions put to him by the Judge, be punished under this section for such refusal. (Empress *v.* Sirsappa, 4 Bom. 15.)

A refusal to sign a deposition before the Coroner is an offence under this section. See Act IV. of 1871, s. 20 (Coroners).

False statement on oath to public servant or person authorized to administer oath.

181. Whoever, being legally bound by an oath or affirmation (Act X. of 1873, s. 15: Oaths) to state the truth on any subject to any public servant or other person authorized by law to administer such oath, makes to such public servant or person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false, or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

For commentary on this section, see Part II., s. 335.

False information, with intent to cause public servant to use his lawful power to the injury of another person.

182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause or knowing it to be likely that he will thereby cause, such public servant—

(*a*) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations.

(*a*) A informs a Magistrate that Z, a Police officer subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(*b*) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(*c*) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the Police will make inquiries and institute searches in the village to the annoyance of the villagers, or some of them. A has committed an offence under this section. (Act III. of 1895, s. 1.)

For commentary on s. 182, see Part II., ss. 353–356, 363.

Where the information given is a charge of a criminal nature, no proceedings should be taken under s. 182 until the criminal charge is disposed of. (Empress *v.* Jamni, 5 All. 387.)

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Resistance to the taking of property by the lawful authority of a public servant.

Commentary.

As to the cases in which resistance may lawfully be made to the acts of public servants in taking property, see Part II., ss. 207–214.

184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Obstructing sale of property offered for sale by authority of a public servant.

185. Whoever, at any sale of property held by the lawful authority of a public servant as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Illegal purchase or bid for property offered for sale by authority of a public servant.

Commentary.

Where property is sold for arrears of rent, it was formerly not competent for the defaulters or their sureties to purchase it. (Mad. Reg. XXVIII. of 1802, s. 27 (Distress)). Nor could property distrained for arrears be purchased by the distrainers or appraisers. (*Ibid.*, s. 26.) But no corresponding provisions are contained in the Madras Rent Act, VIII. of 1865, which repeals Reg. XXVIII. of 1802.

Officers concerned in execution sales are not allowed to bid for or buy property at such sale. Nor can decree holders do so without express permission of the Court. (Cr. P. C., ss. 292, 294.)

A mock bidding for a lease of a ferry, set up to auction sale by a Magistrate, was held to come under this section. (Reg. *v.* Reazooddeen, 3 Suth. Cr. 33.)

186. Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Obstructing public servant in discharge of his public functions.

Commentary.

A person nominated by the Collector under s. 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the landlord and the tenant, is not a public servant within the meaning of this section. (Chatter Lal *v.* Thakur Pershad, 18 Cal. 518.)

The conduct chargeable as an offence must be some definite act intended to have the effect assigned to it. It is not an offence to circulate reports which prevent persons bringing their children to the public vaccinator for vaccination, any more than it would be to persuade them not to do so. (Reg. *v.* Thimmachi, 15 Mad. 93.) A Judge in the progress of a civil suit appointed a Commissioner to make an inventory of the goods in a merchant's house, and to remove certain property to the Court. On the arrival of the Commissioner the merchant shut himself up in his house. He did not barricade his

doors, but he refused to open them. A crowd of an orderly character collected outside the door, but was not brought there by any act of the merchant. The Commissioner went away, considering that it would be unsafe to use force. It was held that merely passive resistance of the accused was not an offence under s. 186. (Reg. *v.* Somanna, 15 Mad. 221.)

Escape from lawful custody is not punishable under this section; the charge should be under s. 224. (Reg. *v.* Poshu, 2 Bom. H.C. 134.)

It would be incredible, if it were not true, that a Magistrate has actually been found to convict a person under this section, because, being the owner of a cart, he refused to give it on hire to a Government officer who applied for it. It ought to be unnecessary to add that the conviction was annulled. (Reg. *v.* Dhori, 9 Bom. H.C. 165.)

A public servant is not discharging his public functions when he is doing, or ordering, something which is wholly beyond his jurisdiction. (Reg. *v.* Tulsiram, 13 Bom. 168; Lilla Singh *v.* Reg., 22 Cal. 286.)

Omission to assist public servant when bound by law to give assistance.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Commentary.

See as to the word "offence," s. 40, *ante*, p. 13.

As to the persons who are bound by law to assist public servants, see Part II., s. 149.

The assistance which a private person is bound to render to a public servant in the execution of his duty, must be something definite and specific. An order by the Magistrate in a case of theft directing a Zemindar "to get a clue of the case within 15 days and to give sufficient assistance to the Police" was held to be illegal. (Empress *v.* Bakshi, 3 All. 201.)

Disobedience to an order duly promulgated by a public servant.

188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes, or tends to cause, danger to human life, health, or safety, or causes, or tends to cause, a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys and that his disobedience produces, or is likely to produce harm.

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in the section.

For commentary, see Part II., Chap. VI.

Threat of injury to a public servant.

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

I conceive that the injury referred to in the above sections need not necessarily be an illegal injury, and that any threat of harm which is not the lawful result of the act itself is prohibited. For instance, it is

perfectly lawful to prosecute a public servant for bribery. But if a suitor were to threaten a Moonsiff with disclosure of an act of bribery, in order to influence his decision in a suit pending before him, this would be a criminal act. If however an official were about to perform an illegal act, it would not be criminal to threaten that he should be reported and held up to the displeasure of his superiors. For this would be merely the lawful result of the act which he was committing. Where the threat is verbal only, it is material to establish the precise words that were used, so as to enable the Court to judge, whether the threat was one of injury, or only such a threat of making a lawful complaint as would be justifiable under the facts of the case. (Reg. *v.* Maheshri Bakhsh, 8 All. 380.)

Threat of injury to induce any person to refrain from applying for protection to a public servant.

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury, to any public servant legally empowered as such to give such protection or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Commentary.

See the petition of Paul de Cruz, 8 Mad. 140, and commentary to s. 508, *post*.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

For commentary on this chapter, see Part II., Chap. VII., and special references to the following sections.

191. Whoever, being legally bound on an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of the section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of the section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations.

(*a*) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(*b*) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief and is true as to his belief, and, therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at the place on the day named or not.

(*e*) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not, and which he does not believe to be a true interpretation or translation. A has given false evidence.

For commentary on this section, see Part II., ss. 306–313.

Fabricating false evidence.

192. Whoever causes any circumstances to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

For commentary on this section, see Part II., ss. 319-324.

Punishment for false evidence.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court Martial or before a Military Court of Request is a Judicial Proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

For commentary on this section, see Part II., ss. 325-332.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code, or by the law of England (Act XXVII. of 1870, s. 7), shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Giving or fabricating false evidence with intent to procure conviction of a capital offence.

If innocent person be thereby convicted and executed.

Commentary.

A man who, on the trial of A for murder, states that the murder was not committed by A, but that it was committed by B, who is not in custody, has not committed an offence under s. 194, as his evidence, so given, cannot cause any person to be convicted of a capital offence. He is only punishable under s. 193. (Reg. *v.* Hardyal, 3 B.L.R.A. Cr. 35.)

195. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by this Code, or by the law of England (Act XXVII. of 1870, s. 7), is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment.

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment with or without fine.

Commentary.

Where a man burns his own house and charges another with the act, he should be convicted under s. 211, and not under this section. (Reg. *v.* Bhugwan, 8 Suth. Cr. 65.)

Illustrations.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

For commentary on this section, see Part II., ss. 319-324.

Punishment for false evidence.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court Martial or before a Military Court of Request is a Judicial Proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

For commentary on this section, see Part II., ss. 325–332.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code, or by the law of England (Act XXVII. of 1870, s. 7), shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Giving or fabricating false evidence with intent to procure conviction of a capital offence.

If innocent person be thereby convicted and executed.

Commentary.

A man who, on the trial of A for murder, states that the murder was not committed by A, but that it was committed by B, who is not in custody, has not committed an offence under s. 194, as his evidence, so given, cannot cause any person to be convicted of a capital offence. He is only punishable under s. 193. (Reg. *v.* Hardyal, 3 B.L.R.A. Cr. 35.)

Illustrations.

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

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Giving or fabricating false evidence with intent to procure conviction of a capital offence.

If innocent person be thereby convicted and executed.

Commentary.

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195. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by this Code, or by the law of England (Act XXVII. of 1870, s. 7), is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment.

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment with or without fine.

Commentary.

Where a man burns his own house and charges another with the act, he should be convicted under s. 211, and not under this section. (Reg. *v.* Bhugwan, 8 Suth. Cr. 65.)

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

For commentary on this section, see Part II., s. 333.

See Act XIV. of 1882, s. 643 (Civ. Pro. Code).

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Issuing or signing a false certificate.

For commentary on this section, see Part II., s. 310.

198. Whoever corruptly uses, or attempts to use, any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as a true certificate one known to be false in a material point.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows, or believes, to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

False statement made in any declaration which is by law receivable as evidence.

For commentary on this section, see Part II., s. 311.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true any such declaration known to be false.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

See s. 643 of Act XIV. of 1882 (Civ. Pro. Code).

201. Whoever, knowing or having reason to believe that an offence (see s. 40, *ante*, p. 13) has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender.

If a capital offence.

If punishable with transportation.

If punishable with less than ten years' imprisonment.

Illustration.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

For commentary on this section, see Part II., ss. 336, 337.

202. Whoever, knowing or having reason to believe that an offence (see s. 40, *ante*, p. 13) has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Intentional omission to give information of an offence by a person bound to inform.

203. Whoever, knowing or having reason to believe that an offence (see s. 40, *ante*, p. 13) has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with

Giving false information respecting an offence committed.

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In sections 201 and 202 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460 (Act III. of 1894, s. 6).

For commentary on ss. 202, 203, see Part II., s. 338.

Destruction of document to prevent its production as evidence.

204. Whoever secretes, or destroys, any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant as such, or obliterates, or renders illegible, the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

Where a party to a suit snatched up a document, which had been produced in evidence, and ran away with it, in order to prevent a witness referring to it, he was held to have committed an offence under this section, and not theft. (Subramania *v.* the Queen, 3 Mad. 261.)

False personation for the purpose of any act or proceeding in a suit.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Commentary.

Fraudulent gain or benefit to the party charged is not an essential element in this offence. Therefore, a conviction was upheld where the 1st prisoner was charged with personating the 4th, and the 4th

prisoner was charged with abetting the personation by the 1st; the facts being, that the 4th, to save himself the trouble of laying information before a Magistrate with regard to the theft of some bullocks, sent the 1st prisoner to do so, and to represent himself as being the 4th. (*Ex parte* Suppakon, 1 Mad. H. C. 450; see Reg. *v.* Narain Acharj, 8 Suth. Cr. 80.)

It has been ruled in Bengal that the offence may be committed even where the prisoner has personated a purely imaginary person. (Reg. *v.* Bhitto, Ind. Jur. 123.) But the High Court of Madras has declined to follow that decision, saying:—

"To constitute the offence of false personation under s. 205 of the Penal Code, it is not enough to show the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. The use of an assumed name without more is not an offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under s. 205, we think, is the feigning to be another known person. The whole language of the section clearly imports the acting the part of another person, the actor pretending that he is that person."

"There are sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the ss. 140, 170, 171, and 415, but they have no application to the present case, and the last section is made applicable to personation of an imaginary person by an express enactment." (Reg. *v.* Kadar, 4 Mad. H. C. 18.)

See s. 643 of Act XIV. of 1882 (Civ. Pro. Code).

206. Whoever fraudulently removes, conceals, transfers, or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree.

For commentary on ss. 206-208, see Part II., ss. 339-346.

207. Whoever fraudulently accepts, receives, or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest

Fraudulent claim to property to prevent its seizure as a forfeiture or in execution of a decree.

therein from being taken as a forfeiture, or in satisfaction of a fine under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree, or order, which has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

See s. 643 of Act XIV. of 1882 (Civ. Pro. Code).

208. Whoever fraudulently causes or suffers a decree, or order, to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person, or for any property, or interest in property, to which such person is not entitled, or fraudulently causes or suffers a decree, or order, to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fraudulently suffering a decree for a sum not due.

Illustration.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account, or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

209. Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Dishonestly making false claim in a Court of Justice.

Commentary

See Cr. P. C., s. 195 (*b*), and s. 643 of Act XIV. of 1882 (Civ. Pro. Code).

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is no

Fraudulently obtaining a decree for a sum not due.

entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied, or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

See Cr. P. C., s. 195 (*b*), and s. 643 of Act XIV. of 1882 (Civ. Pro. Code). The word "satisfied" in this section is to be understood in its ordinary sense, and is not limited to decrees the satisfaction of which has been certified to the Court. (Reg. *v.* Bapuji, 10 Bom. 288; Madhub Chunder *v.* Novodeep, 16 Cal. 126.)

False charge of offence made with intent to injure.

211. Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against that person, or falsely charges any person with having committed an offence (see s. 40, *ante*, and note to s. 224, *post*), knowing that there is no just or lawful ground for such proceedings or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For commentary on s. 211, see Part II., ss. 357-363.

Harbouring an offender.

If a capital offence.

If punishable with transportation for life, or with imprisonment.

212. Whenever an offence (see s. 40, *ante*, p. 13, and note to s. 224, *post*) has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment

of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India (Act. III. of 1894, s. 7).

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

For commentary, see Part II., ss. 247–251.

213. Whoever accepts, or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence (see s. 40, *ante*, and note to s. 224, *post*), or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and

Taking gift, etc., to screen an offender from punishment.

If a capital offence.

If punishable with transportation for life, or with imprisonment.

if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

For commentary on ss. 213, 214, see Part. II., ss. 252-258.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence (see s. 40, *ante*, p. 13, and note to s. 224, *post*), or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Offering gift or restoration of property in consideration of screening offender.

If a capital offence.

If punishable with transportation for life, or with imprisonment.

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded (Act VIII. of 1882, s. 6).

Commentary.

The illustrations formerly appended to this section have been repealed by Schedule I. of the Crim. P. C., Act X. of 1882. The whole law as to compounding offences is now contained in s. 345 of that Act.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under

Taking gift to help to recover stolen property, etc.

this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on s. 215, see Part II., s. 259.

216. Whenever any person convicted of or charged with an offence (see s. 40, *ante*, p. 13, and note to s. 224, *post*), being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; if the offence is punishable with transportation for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

Harbouring an offender who has escaped from custody, or whose apprehension has been ordered.

If a capital offence.

If punishable with transportation for life, or with imprisonment.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India (Act X. of 1886, s. 23).

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

Penalty for harbouring robbers or dacoits.

216A. Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

Definition of "harbour" in sections 212, 216 and 216A.

216B. In sections 212, 216, and 216A, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension (Act III. of 1894, s. 8).

For commentary on ss. 216, 216A, see Part II., ss. 247–251.

Public servant disobeying a direction of law with intent to save person from punishment or property from forfeiture.

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture, or any charge, to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

The direction of law here referred to means some express direction, such as is contained in the Crim. P. C., ss. 44, 45. It does not extend

to the general obligation not to stifle a criminal charge, which is common to all subjects. (Reg. *v.* Raminihi, 1 Mad. 266.) On the other hand, it is not necessary to show that the person intended to be saved had committed any offence, or was justly liable to punishment. The criminality consists not in saving a guilty man from punishment, but in obstructing the proper course of justice in his case. (Empress *v.* Amir Uddeen, 3 Cal. 412.)

Public servant framing an incorrect record or writing with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being, as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Commentary.

See the remarks upon this section, *ante*, note to s. 167. A man who intentionally read out false abstracts of papers to a person who was preparing a record, in consequence of which the latter innocently produced what was a false record, was held not to have committed an offence under this section, but to be properly indictable for abetting such an offence. (Reg. *v.* Brij Mohun, 7 N.W.P. 134.)

A public servant who frames a false document, of a character which it was not his duty to prepare, is not punishable under this section (Empress *v.* Mazhar Husain, 5 All. 553), nor is he in any case punishable, if his object in preparing the false document was to screen himself from punishment, by concealing the fact that he had committed a breach of duty (Empress *v.* Gauri Shankar, 6 All. 42), unless the mode in which he has framed the false document has, and must have been known by him to have, the effect of causing injury to the public or to others. (Reg. *v.* Girdhari Lal, 8 All. 653.)

A Sub-Inspector of Police was charged with having falsely reported the absence from duty of one of the chowkeedars. Part of the evidence against him was an entry by the defendant, a constable, that the supposed absentee had been present on a particular day. It was proved that the charge by the sub-inspector was perfectly true, and that the entry by the constable was false. A conviction of the constable under s. 218 was set aside. The Court held that the intention to injure the sub-inspector by the false entry was too remote. That the real intention was to screen the chowkeedar, but that the term "legal punishment" was not intended to apply to a case of this

kind, where, if the chowkeedar had been found to be absent, he could only be fined by his superior in the police. (Reg. *v.* Jungle Lall, 19 Suth. Cr. 30.)

Public servant in a judicial proceeding corruptly making an order, report, etc., which he knows to be contrary to law.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commentary.

As to the phrase "judicial proceeding," see Part II., ss. 325–327.

Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly, or maliciously, commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commentary.

It is only where there has been an excess, by a Police officer of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law. Where the arrest is legal, there can be no guilty knowledge, superadded to an illegal act, such as it is necessary to establish against the accused, so as to justify a conviction under s. 220. (Reg. *v.* Amarsang, 10 Bom. 506.)

Intentional omission to apprehend on the part of a public servant bound by law to apprehend.

Punishment.

221. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person charged with or liable to be apprehended for an offence (see s. 40, *ante*, p. 13), intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say :—

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable by death; or

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended, for an offence punishable with imprisonment for a term less than ten years.

Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice.

Punishment.

222. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person under sentence of a Court of Justice for an offence (see s. 40, *ante*, p. 13) or lawfully committed to custody (Act XXVII. of 1870, s. 8), intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say:—

With transportation for life, or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life, or to transportation, or penal servitude, or imprisonment for a term of ten years or upwards; or

With imprisonment of eithe[illegible]cription for a term which may extend to three years, or [illegible] fine, or with both, if the

person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not exceeding ten years, or if the person was lawfully committed to custody (Act XXVII. of 1870, s. 8).

Commentary.

It is essential to prove the legal obligation imposed upon a public officer, neglect of which is charged against him. For instance, a village watchman in the N.W.P. is not bound to arrest beyond his beat a person who is not a proclaimed offender, nor one who has committed certain heinous offences specified in Act XVI. of 1873, s. 8, unless such offences were committed in his presence. (Empress *v.* Kallu, 3 All. 60.)

Escape from confinement negligently suffered by public servant.

223. Whoever, being a public servant, legally bound as such public servant to keep in confinement any person charged with or convicted of any offence (see s. 40, *ante*, p. 13) or lawfully committed to custody (see Act XXVII. of 1870, s. 8), negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Commentary.

Convict warders are public servants within the meaning of this section. (Reg. *v.* Kallachand, 7 Suth. Cr. 99.)

This section applies only to cases where the person who is allowed to escape, is in custody for an offence or has been committed to custody, and not to cases where such person has simply been arrested under civil process. (Reg. *v.* Tafaullah, 12 Cal. 190.) Such a case would, however, be met by s. 225A.

Resistance or obstruction by a person to his lawful apprehension.

224. Whoever intentionally offers any resistance, or illegal obstruction, to the lawful apprehension of himself for any offence (see s. 40, *ante*, p. 13) with which he is charged, or of which he has been convicted; or escapes, or attempts to escape, from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended, or detained in custody, was liable for the offence with which he was charged, or of which he was convicted.

Commentary.

The escape which is punishable under this section is escape from custody for an offence. Escape from custody under civil process is not punishable. (Reg. *v.* Connon, 6 Bom. H.C. C.C. 15.) Nor escape from or resistance to apprehension under s. 55 of the Cr. P. C., as being a person of bad livelihood. (Reg. *v.* Kandhaia, 7 All. 67.) Such cases would now be covered by s. 225B.

Act IV. of 1867 (defining "Offence"), followed by Act XXVII. of 1870 (Penal Code Amendment) (see s. 40, *ante*), has cleared away a good many difficulties which attended these sections, 221–225. It extends the meaning of the word "offence" to anything made punishable by a special or local law, and renders escape from custody for default of giving security under Chap. XXXVIII. of the Cr. P. C. punishable with one year's imprisonment, or fine, or both (s. 225A, *post*). The introduction of the words "lawfully committed to custody" in ss. 222 and 223 also meets the case of persons lawfully arrested on suspicion, *e.g.* under Cr. P. C., s. 55, though not actually charged with any specific offence. (See 5 Suth. Cr. let. 9; S.C. 1 Wym. Circ. 26; Empress *v.* Ashraf Ali, 6 All. 129.) It is no offence to escape from custody, where the accused, not being a proclaimed offender, has been arrested by a private person for an offence, such as theft not committed in his presence. (Reg. *v.* Bojjigan, 5 Mad. 22; Cr. P. C., s. 59.) Nor when a person had been arrested in mistake for another of the same name against whom a warrant had been issued. (Ganga Charan *v.* Reg. 21 Cal. 337.) But where a private person has arrested a thief, caught in the act of stealing, his arrest continues to be lawful, though he is forwarded to the police station in custody of a person who has not witnessed the offence. (Reg. *v.* Potadu, 11 Mad. 480.) And so it was held when the accused had been apprehended on a hue and cry raised as he was running away after committing a robbery. He was then handed over to the village magistrate, from whose custody he escaped. The village magistrate was authorized under Reg. XI. of 1816, s. 5, to apprehend all persons charged with committing crimes in the district, and to forward them to the police officer. His detention for this purpose was therefore legal. (Reg. *v.* Fakira, 17 Mad. 103.)

A charge of having escaped from custody may be inquired into and tried where the person charged happens to be when the charge is made. (Cr. P. C., s. 181.)

Any sentence passed on an escaped convict, either for the escape or for any other offence, may, according to its nature, be ordered to take effect immediately, or at the expiration of the period of his former sentence. (Cr. P. C., s. 396.)

225. Whoever intentionally offers any resistance, or illegal obstruction, to the lawful apprehension of any other person for an offence (see s. 40, *ante*, p. 13), or rescues, or attempts to rescue, any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

Resistance or obstruction to the lawful apprehension of another person.

Punishment.

Or, if the person to be apprehended, or the person rescued, or attempted to be rescued, is charged with, or liable to be apprehended for, an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with, or liable to be apprehended for, an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is under the sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Commentary.

A person who rescues a prisoner arrested by a Police officer as a member of an unlawful assembly is guilty of an offence under this section. (Reg. *v.* Assan, 13 Suth. Cr. 75.) And the offence is equally committed by rescuing one who has been lawfully arrested by a private person; for instance, a thief who was seized in the act of stealing. (Reg. *v.* Kutti, 11 Mad. 441.)

Omission to apprehend, or sufferance of escape, on part of public servant in cases not otherwise provided for.

225A. Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222, or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

(*a*) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

225B. Whoever, in any case not provided for in section 224 or section 225, or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both. (Act X. of 1886, s. 24.)

Commentary.

See notes to ss. 223 and 224: A person who has been acquitted of a charge on the ground of insanity, and confined in gaol under the orders of Government, would be punishable under s. 225B if he escaped after he became sane, though he would not be liable under s. 224. (Pro. Mad. H.C. 25 Nov. 1862.)

Unlawful return from transportation.

226. Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Commentary.

To constitute this offence it is essential that the convict should actually have been sent to a penal settlement, and have returned before his sentence had expired or been remitted. Where a prisoner had escaped from custody whilst on his way to undergo sentence of transportation, it was held that he had committed an offence punishable under s. 224, not under s. 226. (Reg. *v.* Ramasamy, 4 Mad. H. C 152.)

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

Violation of condition of remission of punishment.

228. Whoever intentionally offers any insult, or causes any interruption, to any public servant while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Intentional insults or interruption to a public servant sitting in any stage of a judicial proceeding.

Commentary.

The proceeding under s. 480 of the Cr. P. C., when resulting in a punishment under the above section, is a "conviction upon trial" within the meaning of the Cr. P. C., s. 410, against which an appeal lies. (Reg. *v* Chappu, 4 Mad. H.C. 146.) See too, *in re*, Pollard (L.R. 2 P.C. 106.)

Persons who are guilty of gross prevarication in giving evidence before a Court of Justice, or of refusing or neglecting to return direct answers to questions, may be punished under this section, if their conduct amounts to an intentional interruption. (Reg. *v.* Jamail, 10 Bom. H.C. 69, explaining Reg. *v.* Auba, 4 Bom. H.C. C.C. 6, and Reg. *v.* Pandu, *ib.* 7.)

To leave the Court when ordered to remain, or to make signs from outside to a prisoner on his trial, have been held not to be offences under this section. (Mad. H.C. Rul., 17th January, 1870; S.C. Weir, [illegible] [91], 21 October, 1870.)

A person who bids for an estate at an execution-sale, knowing he cannot deposit the earnest money, is punishable under this section. (Reg. *v.* Mohesh Chunder, Suth. Sp. Mis. 3.)

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled, or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled, or sworn, or, knowing himself to have been so returned, empanelled, or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be

Personation of a juror or assessor.

Abetting in India the counterfeiting out of India of coin.

236. Whoever, being within British India, abets the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Import or export of counterfeit coin.

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing, or having reason to believe, that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Import or export of counterfeit of the Queen's coin.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows, or has reason to believe to be, a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery to another of coin, possessed with the knowledge that it is counterfeit.

239. Whoever, having any counterfeit coin which at the time when he became possessed of it he knew to be counterfeit, fraudulently, or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

For commentary on ss. 239, 240, see Part II., s. 574.

Delivery of Queen's coin, possessed with the knowledge that it is counterfeit.

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which at the time when he became possessed of it he knew to be a counterfeit of the Queen's coin, fraudulently, or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.

Illustration.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit, and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under s. 239 or s. 240 as the case may be.

For commentary on ss. 241–243, see Part II., s. 575.

242. Whoever fraudulently, or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.

243. Whoever fraudulently, or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof.

244. Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished

Person employed in a mint causing coin to be of a different weight or composition from that fixed by law.

Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.

253. Whoever fraudulently, or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be altered.

254. Whoever delivers to any other person as genuine, or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248, or 249, has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

Commentary.

In the great majority of coin offences, the false coin is substantially worthless. It would, however, be a very profitable transaction to make and circulate silver or copper coins of exactly the same intrinsic value as those issued by Government. Such an act would undoubtedly come within the meaning of Counterfeit Coin under the previous sections of this chapter. It is specifically provided for by the Metal Tokens Act I. of 1889; which forbids the making or issuing of metal intended to be used as money, but not authorized by the Indian Government. Its provisions are as follows:—

"1. (1) This Act may be called the Metal Tokens Act, 1889.
(2) It extends to the whole of British India; and
(3) It shall come into force at once.

"2. In this Act 'issue' means to put a piece of metal into circulation for the first time for use as money in British India, such piece having been made in contravention of this Act or brought into British India by sea or by land in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878 [VIII. of 1878].

"3. No piece of copper or bronze or of any other metal or mixed metal, which, whether stamped or unstamped, is intended to be used as money, shall be made except by the authority of the Governor-General in Council.

"4. (1) In either of the following cases, namely :—

"(*a*) if any person makes in contravention of the last foregoing section, or issues or attempts to issue, any such piece as is mentioned in that section,

"(*b*) if, after the expiration of three months from the commencement of this Act, any person has in his possession, custody, or control, any such piece as is mentioned in the last foregoing section, with intent to issue the piece,

" the person shall be punished,—

"(*i*) if he has not been previously convicted under this section, with imprisonment which may extend to one year, or with fine, or with both ; or,

"(*ii*) if he has been previously convicted under this section, with imprisonment which may extend to three years, or with fine, or with both.

"(2) If any person is convicted of an offence under sub-section (1), he shall, in addition to any other punishment to which he may be sentenced, forfeit all such pieces as aforesaid, and all instruments and materials for the making of such pieces, which may have been found in his possession, custody, or control.

"(3) If in the trial of any such offence the question arises whether any piece of metal or mixed metal was intended to be used or to be issued for use as money, the burden of proving that the piece was not intended to be so used or issued shall lie on the accused person.

"5. (1) The offence of making, in contravention of section 3, any such piece as is mentioned in that section shall be a cognizable offence.

"(2) Notwithstanding anything in the Code of Criminal Procedure, 1882 [X. of 1882], no other offence punishable under section 4 shall be a cognizable offence, or beyond the limits of a presidency-town be taken cognizance of by any Magistrate, except a District Magistrate or Subdivisional Magistrate, without the previous sanction of the District Magistrate or Subdivisional Magistrate.

"6. If at any time the Governor-General in Council sees fit, by notification under section 19 of the Sea Customs Act, 1878 [VIII., 1878], to prohibit or restrict the bringing by sea or by land into British India of any such pieces of metal as are mentioned in section 3, he may by the notification direct that any person contravening the prohibition or restriction shall be liable to the punishment to which he would be liable if he were convicted under this Act of making such pieces in British India, instead of to the penalty mentioned in section 167 of the Sea Customs Act, 1878, and that the provisions of sub-section (3) of section 4, and sub-section (1) of section 5, or of either sub-section, in relation to the offence of making such pieces shall, notwithstanding anything in the Sea Customs Act, 1878, apply, so far

as they can be made applicable, to the offence of contravening the prohibition or restriction notified under s. 19 of that Act."

Counterfeiting a Government stamp.

255. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.

256. Whoever has in his possession any instrument, or material, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or selling instrument for the purpose of counterfeiting a Government stamp.

257. Whoever makes, or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing, or having reason to believe, that it is intended to be used for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sale of counterfeit Government stamp.

258. Whoever sells, or offers for sale, any stamp which he knows, or has reason to believe, to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Having possession of a counterfeit Government stamp.

259. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose, of the same as a genuine stamp, or in order that

it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Using as genuine a Government stamp known to be counterfeit.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Effacing any writing from a substance bearing a Government stamp, or removing from a document stamp used for it, with intent to cause loss to Government.

261. Whoever fraudulently, or with intent to cause loss to the Government, removes, or effaces, from any substance bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Commentary.

The intention with which the acts named in the above section are done may be either fraudulent generally, or with a special view to cause loss to Government. And, therefore, a conviction would be good where the intention of the act was merely to efface a document with a view injuriously to affect the rights of another person. No intention to cause loss to Government can be assumed unless it is shown, or may be inferred, that the intention of the party was to use the stamp as a stamp a second time. And, therefore, no conviction could be supported, if the object of removing writing from a stamped paper was merely to write upon the blank space something which required no stamp.

Using a Government stamp known to have been before used.

262. Whoever fraudulently, or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Erasure of mark denoting that stamp has been used.

263. Whoever fraudulently, or with intent to cause loss to Government, erases, or removes, from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells, or disposes of, any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

263A. (1) Whoever—

Prohibition of fictitious stamps.

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(*c*) makes or, without lawful excuse, has in his possession any die, plate, instrument, or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument, or materials in the possession of any person for making any fictitious stamp, may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage, or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255–263, both inclusive, the word "Government," when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country. (Act. III. of 1895, s. 2.)

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

264. WHOEVER fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false instrument for weighing.

Commentary.

The instrument used must not only be known to be false, but must also be fraudulently so used; that is, it must be used for the purpose of passing off short weight upon persons who are entitled to full weight.

In general the mere possession of a false balance, which is used as a true one, will be sufficient evidence of a fraudulent intention.

"The intention, however, must be alleged in laying the charge, though it may be a matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may of course be rebutted. But where the incorrectness of the scale is visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from the defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance." (2nd Report, 1847, ss. 220, 221.)

See as to the summary jurisdiction of the Magistrate of the district over offences defined by this section, and ss. 265, 266, Crim. P. C., s. 260 (*b*).

265. Whoever fraudulently uses any false weight, or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use of false weight or measure.

Commentary.

Where a tradesman supplied milk, which he sent in his own churns by train, the churns being fitted with a gauge to show how many gallons they held, and the gauge indicated a greater amount than was actually contained, the churns were held to be measures within the meaning of an English Act similar to ss. 265, 266. (Harris *v.* London County Council [1895], 1 Q. B. 240.)

266. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Being in possession of false weights or measures.

267. Whoever makes, sells, or disposes of, any instrument for weighing, or any weight, or any measure of length or capacity, which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making or selling false weights or measures.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

For commentary on this chapter, see Part II., Chap. VIII., and special references to the following sections.

268. A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance, to the public or to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance, to persons who may have occasion to use any public right.

Public nuisance.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

For commentary on this section, see Part II., ss. 365-373.

269. Whoever unlawfully, or negligently, does any act which is, and which he knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of any disease dangerous to life.

For commentary on ss. 269 and 270, see Part II., ss. 374-376.

270. Whoever malignantly does any act which is, and which he knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Malignant act likely to spread infection of any disease dangerous to life.

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Disobedience to a quarantine rule.

Commentary.

Act I. of 1870 (Quarantine) provides for the promulgation by the Government of India and the Local Government of quarantine rules, which are to be published, and taken as rules made and promulgated under s. 271.

272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Adulteration of food or drink which is intended for sale.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing, or having reason to believe, that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Sale of noxious food or drink.

Commentary.

The adulteration mentioned in the two preceding sections must be such as renders it injurious to health. Mixing water with milk, sloe

leaves with tea, or chicory with coffee, would not be punishable. It would be otherwise with such compounds as beer doctored with strychnine, spirits mixed with vitrol, cakes coated with red lead, and such like poisonous compounds. Where the person charged is himself the party who has directed the adulteration, the fact that the article has been sold, or was manufactured for sale, will be sufficient to warrant a conviction. On the other hand, where the party is merely the vendor of that which has been manufactured by others, some further evidence will be necessary, in order to show that he knew, not only that there was some adulteration, but also what was the extent and probable consequence of that adulteration. It must be remembered that in most cases there are some recognized modes of adulterating particular articles of food, which are perfectly well known to the trade, and, therefore, where it is shown that the vendor knew that the article was in fact adulterated, it will in most cases be no very unsafe presumption that he had reason to know what the character of the adulteration was. The knowledge of the adulteration will seldom be capable of direct proof. Where the article is in fact adulterated, and where it is shown that the vendor purchased it at a price below that for which the genuine article could be procured, such knowledge may safely be inferred. The presumption would be strengthened if it could be shown that the vendor had several articles of the same species on hand, at different prices, some adulterated and some not, or adulterated to different degrees.

Under an English statute, somewhat similar to the above, it has been held that the offence is only committed by the sale of an article which, at the time of sale, professes to be either food or drink. An article such as baking powder, which is not itself food, though used in the preparation of food, is not within the Act. (James *v.* Jones [1894], 1 Q.B. 304.

Little difficulty can ever be felt where the bad quality of the article arises, not from any adulteration which might possibly escape notice, but from its own intrinsic defects. As, for instance, where unsound meat is sold. And, even though the defect has escaped the notice of the purchaser, it must be remembered that the seller has generally such an accurate knowledge of the qualities of his ware, and of the previous history of each particular article, as renders it very unlikely that he could be ignorant of any fault of a glaring character.

Adulteration of drugs.

274. Whoever adulterates any drug, or medical preparation, in such a manner as to lessen the efficacy, or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

275. Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Sale of adulterated drugs.

Commentary.

Under this and the previous section it is not necessary to show that the drug was so adulterated as to render it noxious to life. It is sufficient if its efficacy is lessened. The necessity for this enactment is obvious enough. All drugs are of a recognized average strength, and prescriptions are made up on the understanding that they possess such strength. If however, the drug which a physician prescribes proves to be only half the strength on which he calculated it may prove wholly useless, and death may ensue before the error is remedied. The act only speaks of the efficacy of the drug being lessened, or its operation changed. It would, however, be necessary to show that the difference in the drug was of so considerable a character as to make an appreciable and important change in its character and effect. The use of the word "adulteration" implies the mixture of some foreign element. And, therefore, a merely inferior quality of the same medicine will not amount to an adulteration. For instance, there are many different sorts of cod liver oil, and the same oil prepared in different ways may produce different degrees of effect. But if an apothecary, being ordered to supply a quart of cod liver oil for a person in consumption, were to send a quart of the most inferior oil of that description, this would not be an act indictable under either section, provided the oil, however inferior in quality, was genuine of its kind.

It will be observed that the essence of the offence consists, not so much in the adulteration, as in the passing the article off as unadulterated. Any one who chooses may mix anything he likes with any medicine, but he must not sell it as if it was unadulterated, nor for the purpose of being sold as unadulterated. This must, I imagine, be taken as the meaning of the words "knowing it to be likely that it will be sold as if it had not undergone such adulteration." If a druggist were to sell a compounded medicine to an apothecary, communicating exactly its real nature to him, he could not be rendered criminally answerable because the apothecary sold it again as genuine, even though his knowledge of the apothecary's morals made it very probable that such might be the result. But it would be very different if it could be shown that he supplied the spurious commodity, by mutual understanding, for the purpose of being issued to the world as something different.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medicinal preparation as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Sale of any drug as a different drug or preparation.

Commentary.

The offence constituted by this section does not involve the idea of any adulteration, or inferiority, in the substituted medicine. It is sufficient that it is not in fact what it purports to be. If a chemist were to discover a drug which he considered to be just as effective as quinine, and which could be procured for half the price, he would not be justified in selling it as quinine, even though it answered precisely the same purpose. The fraud consists, not in the injury done, but in the false pretence by which persons, who suppose that they are using one medicine, are forced to use another against their will. (Knight *v.* Bowers, 14 Q.B.D. 845.)

277. Whoever voluntarily corrupts, or fouls, the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred rupees, or with both.

Fouling the water of public spring or reservoir.

Commentary.

This section does not apply to a public river (Empress *v.* Halodhur, 2 Cal. 383), or to a continuous stream of water running along the bed of a river. (Reg. *v.* Vetti Chokkan, 4 Mad. 229.) Nor to mere bathing in a tank, not set apart by any lawful order for bathing purposes. (Mad. H.C. Pro., 13th December, 1878; S.C. Weir, 72 [96].)

The Local Government may invest any Bench of Magistrates, invested with the power of a Magistrate of the 2nd or 3rd class, with power to try summarily all or any of the offences coming under ss. 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, and 447. (Crim. P. C., s. 261.)

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling, or carrying on business, in the neighbourhood, or passing along a public way, shall be punished with fine, which may extend to five hundred rupees.

Making atmosphere noxious to health.

279. Whoever drives any vehicle, or rides on any public way in a manner so rash, or negligent, as to endanger human life, or to be likely to cause hurt, or injury, to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Rash driving or riding on a public way.

For commentary on the law of Negligence as relating to ss. 279–289, see Part II., ss. 377–381.

280. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Rash navigation of a vessel.

Commentary.

See cases of fog. The *Lancashire*, L. R. 4 Ad. and Ec. 198; The *Otter*, *ibid.* 203.

281. Whoever exhibits any false light, mark, or buoy, intending, or knowing it to be likely, that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exhibition of a false light, mark, or buoy.

282. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state, or so loaded, as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Conveying person by water for hire in a vessel overloaded or unsafe.

For commentary on this section, see Part II., s. 382.

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way or public line of navigation, shall be punished with fine, which may extend to two hundred rupees.

Danger or obstruction in a public way or navigation.

For commentary on this section, see Part II., ss. 383-391.

Negligent conduct with respect to any poisonous substance.

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Negligent conduct with respect to any fire or combustible matter.

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire, or any combustible matter in his possession, as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Commentary.

It has been held upon this section that the words "injury to any person" include injury to his property as well as to his person. (Reg. *v.* Natha Lalla, 5 Bom. H.C. C.C. 67.)

Negligent conduct with respect to any explosive substance.

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Commentary.

See a case of death following from a child playing with a loaded gun. (Reg. *v.* Chenchugadu, 8 Mad. 421.)

Negligent conduct with respect to any machinery in the possession or under the charge of the offender.

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any machinery in his possession, or under his care, as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Commentary.

See as to unfenced machinery, Indermaur *v.* Dames, L.R. 2 C.P. 311; Britton *v.* G. W. Cotton Co., L.R. 7 Ex. 130.

Negligence with respect to pulling down or repairing buildings.

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Negligence with respect to any animal.

289. Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

For commentary on this section, see Part II., ss. 392–394.

Punishment for public nuisance.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

Continuance of nuisance after injunction to discontinue.

291. Whoever repeats, or continues, a public nuisance, having been enjoined by any public servant, who has lawful authority to issue such injunction, not to repeat, or continue, such nuisance, shall be punished with simple

imprisonment for a term which may extend to six months, or with fine, or with both.

Commentary.

See Cr. P. C., ss. 133, 144, Part II., ss. 297, 373; Reg. *v.* Jokhu, 8 All. 99.

Sale, etc., of obscene books.

292. Whoever sells, or distributes, imports, or prints for sale or hire, or wilfully exhibits to public view, any obscene book, pamphlet, paper, drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any representation sculptured, engraved, painted, or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Commentary.

The word "obscene" is one of considerable ambiguity. In one sense, Hiram Power's statue of the Greek Slave, Ruben's picture of the Judgment of Paris, and the works of Martial or Catullus, must be considered as obscene, that is, as capable of exciting sensual feelings. But it could not be endured that a shopkeeper should be prosecuted for selling copies of the works just mentioned. I conceive that the word must be limited to those productions, the primary and palpable result of which is to excite to lust. Whatever may have been the original object of such writers as Martial or Catullus in their amatory odes, in the present day they are bought and read as monuments of a classical age. Nor can there be any greater indelicacy than the delicacy of those who profess to find impropriety in some of the noblest works of painting and sculpture that have descended to our times. But, however difficult it may be to draw the line in words, the distinction between the two cases will generally be bold enough. In the language of *Cockburn*, C.J., "the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall." Therefore, where a person was indicted for selling a book called "The Confessional Unmasked," showing the depravity of the Romish Priesthood, the iniquity of the confessional, and the questions put to females in confession, and it was found that half of the book was grossly obscene, but that the defendant sold it not for gain, nor for the purpose of prejudicing good morals, but for the purpose of exposing what he considered to be the errors of the Church of Rome, a conviction was supported. The Court held that the immediate motive of the defendant was not the question. If, in fact, the work was one of which it was certain "that it would suggest to the minds of the young

of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character," then its sale was a criminal offence, and it was immaterial that the defendant had in view an ulterior object which was innocent, or even laudable. The law assumed that he contemplated those results which would naturally flow from the perusal of the treatise. (Reg. *v.* Hicklin, L.R. 3 Q.B. 360, 371; Empress *v.* Indarman, 3 All. 837.) And it makes no difference that the obscene matter is contained in an accurate account of a judicial proceeding. (Steele *v.* Brannan, L.R. 7 C.P. 261.)

Having in possession obscene books for sale or exhibition.

293. Whoever has in his possession any such obscene book, or other thing as is mentioned in the last preceding section, for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Commentary.

Upon a conviction under ss. 292 or 293, the Court may order the destruction of all copies of the thing in respect of which the conviction was obtained. (Crim. P.C., s. 521.)

Obscene acts and songs.

294. Whoever, to the annoyance of others,

(*a*) does any obscene act in any public place, or

(*b*) sings, recites, or utters any obscene song, ballad, or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both. (Act III. of 1895, s. 3.)

Commentary.

The words of this section, which make it necessary that the place should be public, and that the act should be to the annoyance of others, seem to point to such open obscenity as would have been a nuisance at common law.

"It seems an established principle, that whatever openly outrages decency and is injurious to public morals, is a misdemeanour at common law." (Reg. *v.* Crunden, 2 Camp. 90 n.)

According to English law, such an act, even if committed in a place of public resort, was not indictable if only one person could have been annoyed by it. (Reg. *v.* Webb, 1 Den. 338.) But though the plural word "others" is used in this section, it includes the singular number under s. 9, unless the contrary appears from the

context. There certainly is no reason why a person who bawls out an indecent song in a railway carriage, to the annoyance of a single lady, should not be punished for it.

An omnibus is a public place for this purpose (Reg. *v.* Holmes, Dears. 207; S.C. 22 L.J.M.C. 122), and so, of course, would a railway train be, or any other place where a great number of persons might be affected by the criminal act. (Reg. *v.* Thallman, 33 L.J.M.C. 59; S.C.L. & C. 326); or a public urinal. (Reg. *v.* Harris, L.R. 1 C.C. 282.)

"In considering whether a particular locality is a public place or not, the Courts look at it in respect to the manner in which it was used at the time of the alleged offence. Thus, if a village storehouse to which people resort for the purchase of goods, or a shop in which medicines are sold, is locked up at night, it then ceases to be a public place, though it was such during the day. And the general principle seems to be, that the place must be one to which people are at the time privileged to resort without an invitation. On the other hand, any place may be made public by a temporary assemblage; and the exclusion of a few persons is not alone sufficient to prevent its being such." (1 Bishop, s. 315.)

"A public place is a place where the public go, no matter whether they have a right to go or not. The right is not the question." (Per *Grove*, J., Reg. *v.* Wellard, 14 Q.B.D. 63 at p. 66; Reg. *v.* Sri Lal, 17 All. 166.)

A charge under s. 292 or s. 294 should be specific as to the words or representations, alleged to be obscene, and the Magistrate should expressly state what he finds to have been exhibited, or uttered, so that the legality of the conviction may be open to examination on appeal. (Reg. *v.* Upendronath, 1 Cal. 356.)

Keeping lottery-office.

294A. Whoever keeps any office, or place, for the purpose of drawing any lottery not authorized by Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, or any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees. (Act XXVII. of 1870, s. 10.)

Commentary.

See Act XXVII. of 1870, s. 13, *ante*, note to s. 130.

A lottery is a distribution of prizes by lot or chance. It makes no difference that the distribution is part of a genuine mercantile transaction, provided the chance forms part of the consideration which is bargained for. Where a dealer sold packets of tea containing one pound each for 2*s.* 6*d.*, and each packet contained a coupon entitling the purchaser of the packet to a prize specified in the coupon, this was held to be a lottery. It was admitted that the tea was fair value

for the money, but the inducement to the purchaser, and what he actually bought was the tea, coupled with the chance of getting something of value by way of a prize, but without the least idea what that prize might be. What the prize might turn out to be was the result of mere chance or accident. (Taylor *v.* Smetton, 11 Q.B.D. 207.) This decision was followed in what was known as the "Missing Word Competition case." (Barclay *v.* Pearson [1893], 2 Ch. 154.) A newspaper proprietor printed in each copy of his paper a paragraph in which the last word was omitted. Any person who cut out a coupon annexed to the paper, and sent it in, filling up what he supposed to be the missing word, and enclosing a shilling, became a competitor. The whole of the money arising from the shillings was to be divided among the successful competitors. If the object had been to indicate the most appropriate word, this would have been an effort of skill. As the competition was arranged the missing word was one chosen at random, and the selection of it was a mere matter of chance.

An advertisement of a lottery to be held in Melbourne was published in a Bombay paper. It was held that the words "such lottery," in the second clause of the above section, applied to "any lottery not authorized by Government," and therefore to a lottery in a foreign country which was not authorized in India, and that an offence punishable under that clause was committed by the person who forwarded the notice for publication, and by the newspaper proprietor who printed it. (Reg. *v.* Mancherji, 10 Bom. 97.)

"No charge of an offence punishable under s. 294A, shall be entertained by any Court unless the prosecution be instituted by order of, or under authority from the local Government." (Act XXVII. of 1870, s. 14; Crim. Pro. Code, s. 196.)

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

Injuring or defiling a place of worship, with intent to insult the religion of any class.

295. WHOEVER destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

The High Court of Allahabad has held that the word "object" in this section must be an inanimate object, and therefore that

slaughtering of a cow, which is held sacred by many Hindus, is not an offence under s. 295. (Reg. *v.* Imam Ali, 10 All. 150; *acc.* Romesh Chauder *v.* Hiru Mondal, 17 Cal. 852. *Contra* by the Punjab Court: Hakim *v.* Empress, 10 All. 159, note.)

Disturbing a religious assembly.

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Commentary.

Among Muhammedans there are two sects, one of whom says the *Amen* in a low tone, while the other repeats it aloud. A member of the latter sect entered a mosque belonging to the former, and called out his *Amen* in a loud voice, and was convicted under this section. *Mahmood*, J., one of the High Court of Allahabad, was of opinion that his act was justified under s. 79 as being one directed by the religious law to which he was subject. The other members of the Court disagreeing with him, ordered the case to be retried, the Magistrate to have regard to the questions: Whether there was an assembly lawfully engaged in the performance of religious worship? Whether it was in fact disturbed by the accused? And whether the accused intended to cause disturbance, or to do an act which he knew to be likely to cause disturbance? (Reg. *v.* Ramsan, 7 All. 461. See Fusul Karim *v.* Haji Mowla, 18 I.A. 59.)

297. Whoever, with intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship, or on any place of sepulture, or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Commentary.

Acts done by a co-owner of property in the exercise of his rights of property cannot amount to a trespass under the first portion of this section, unless they amount to an exclusion of the other co-owners from their rights (*re* Khaja Mahomed Hamin Khan, 3 Mad. 178). But it has been laid down, *obiter*, that a person would be punishable

under this section, who opposed the performance of funeral ceremonies by an alleged adopted son, thereby wounding the feelings of the widow, although the opposition was by way of asserting the invalidity of the adoption. In the particular case, supposing the adoption to have been invalid, the widow was the proper person to perform the funeral rites, and could have done so by proxy. The resistance therefore by the defendant was purely illegal. (Subramania *v.* Venkata, 6 Mad. 254, 257.)

A Hindu had sexual intercourse with a woman in an enclosure surrounding the tomb of a Muhammedan Fakir who was venerated by some of his co-religionists. The Madras High Court set aside a conviction under s. 295, as it was not shown that the place was "held sacred by any class of persons;" they substituted a conviction under s. 297, being of opinion that he knew that his act, if detected, would wound the feelings of the Muhammedan admirers of the Fakir, and that it was immaterial that he believed that his act would not be detected. Considering that the Court negatived all intention to insult any one, and found that the act was committed at 9 P.M., and that the accused was only detected by mere chance, and had reasonable ground to suppose he would escape observation, it seems rather a strong presumption that he knew that any one's feelings were likely to be wounded. (Ratna Mudali, *in re*, 10 Mad. 126.)

Uttering words, etc., with deliberate intent to wound the religious feelings of any person.

298. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Commentary.

These sections are of so dangerous a character, that it is most necessary to bear in mind the general exceptions contained in ss. 76–80. It is clear that a missionary or teacher, *bonâ fide* pursuing his calling, could not be indicted for any offence he might give to others; nor, of course, could a Magistrate, who felt it to be his duty to prevent or interrupt a religious procession; nor a Municipal Commissioner, or Engineer, who dug up a burial ground, or threw down a temple, in the performance of some public work; nor a person who did such an act upon ground which was lawfully his own, whatever might be the offence given thereby.

The original framers of the Code say, in reference to s. 298 (p. 48):—

"In framing this clause we had two objects in view: we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive

that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture, or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause."

Notwithstanding this explanation the complaints against this section were numerous, not only from the Missionaries, but from the Company's Judges, one of whom, Mr. *Giberne*, Judge of the Bombay Sudder Court, says, "this clause might, I think, be excluded, for it almost amounts to a prohibition of preaching the Gospel." In commenting upon these criticisms, the Commissioners quote the above passage, and go on to say—

"We understand these instances to be mentioned as indicative of the strictness with which the definition is to be construed, so as not to make a person criminally liable for words, etc., wounding the religious feelings of another, unless a deliberate intention so to wound his feelings be unequivocally manifested, as it would be by mere railing and abuse, and by offensive attacks upon his religion, under the pretext of discussion, without any argument which an impartial arbiter could possibly believe to have been addressed to him in good faith merely for the purpose of convincing him of the truth. It is here to be observed, that it is not the impression of the offended party that is to be admitted to decide whether the words uttered deserve to be considered as insulting, and whether they were uttered with the deliberate intention of insulting; these are points to be determined upon cool and calm consideration of the circumstances by the Judge. The intention to wound must be *deliberate*, that is, not conceived on the sudden in the course of discussion, but premeditated. It must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with deliberate purpose of so offending him. In other places in the Code, a party is held guilty if he causes a certain effect, the causing of which is an offence, intending to cause that effect, *or knowing that his act was likely to cause it*. Here, there is a marked difference; although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound the feelings of his audience, yet if it were apparent he uttered them on the spur of the occasion, in good faith, simply to further his argument—that he did not take advantage of the occasion to utter them in pursuance of deliberate purpose to offend—he would not, we think, be liable to conviction under s. 298. If, however, a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be, that he had a deliberate intention of wounding the religious feelings of his hearer." (Second Report, 1847, s. 252.)

I have thought it important to give the above extracts at considerable length, as showing what was really meant by those to whom we are indebted for this clause. At the same time I cannot but feel most apprehensive of the effect of a section which requires so much explanation, and is susceptible of so many refined distinctions.

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

For commentary on this chapter, see Part II., Chapters IX. and X., and special references to the following sections.

Of Offences affecting Life.

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Culpable homicide.

Illustrations.

(*a*) A lays sticks and turf over a pit with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in, and is killed. A has committed the offence of culpable homicide.

(*b*) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(*c*) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

For commentary on ss. 299 and 300, see Part II., ss. 399–430.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

For commentary on Explanation 1, see Part II., s. 407.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

For commentary on Explanation 2, see Part II., s. 408.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born.

For commentary on Explanation 3, see Part II., ss. 401, 402.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Murder.

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations.

(*a*) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(*b*) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(*c*) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(*d*) A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—Culpable homicide is not murder, if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

When culpable homicide is not murder.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought, or voluntarily provoked, by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations.

(*a*) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z who is near him but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(*c*) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(*e*) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(*f*) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

For commentary on Exception 1, see Part II., ss. 415–420.

Exception 2.—Culpable homicide is not murder, if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation, and without any intention of doing more harm than is necessary for the purpose of such offence.

Illustration.

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol, Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder, if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

For commentary on Exceptions 2, 3, see Part II., s. 421.

Exception 4.—Culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage, or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

For commentary on Exception 4, see Part II., s. 422.

Exception 5.—Culpable homicide is not murder, when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

For commentary on Exception 5, see Part II., ss. 423–427.

Culpable homicide by causing the death of a person other than the person whose death was intended.

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide, by causing the death of any person whose death he neither intends, nor knows himself to be likely, to cause, the culpable homicide committed by the offender is of the description of which it would have been, if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

For commentary on s. 301, see Part II., s. 428.

Punishment for murder.

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

Commentary.

On a conviction for murder, one or other of the two punishments stated in s. 302 must be awarded. The only discretion allowed to the Judge is to determine which of the two should be awarded, regard being had to the circumstances of the particular case. (Dewan Singh *v.* Reg., 22 Cal. 805.)

It is hardly necessary to observe that no Statute of Limitations exists in criminal law. But where prisoners were convicted of murders committed 19 and 13 years ago, the Court remitted the extreme penalty of the law, considering that it was not called for as a public example. (Mad. F.U. 196 of 1851; 226 of 1852.)

As to finding a verdict of manslaughter, or of any minor offence, where the facts charged as murder do not make out that offence, see Cr. P. C., s. 238.

A person who unintentionally commits murder in a dacoity may be punished under s. 396, but he cannot be separately convicted of murder under s. 302, and of dacoity under s. 396. (Reg. *v.* Rughoo, Suth., January–July, 1864, Cr. 39.)

Punishment for murder by a life-convict.

303. Whoever, being under sentence of transportation for life, commits murder, shall be punished with death.

Punishment for culpable homicide not amounting to murder.

304. Whoever commits culpable homicide not amounting to murder shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,

if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Causing death by negligence.

304A. Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. (Act XXVII. of 1870, s. 12.)

For commentary on s. 304A, see Part II., ss. 431–434.

Abetment of suicide of child or insane person.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Abetment of suicide.

306. If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on ss. 305, 306, see Part II., s. 435.

Attempt to murder.

307. Whoever does any act with such intention, or knowledge, and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.

Attempts by life-convicts.

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death. (Act XXVII. of 1870, s. 11.)

Illustrations.

(*a*) A shoots at Z with intent to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section; and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of this section.

(*d*) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table, or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

For commentary on ss. 307–309, see Part II., ss. 436-440.

308. Whoever does any act with such intention, or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Attempt to commit culpable homicide.

Illustration.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that, if he thereby caused death, he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. (Act VIII. of 1882, s. 7.)

Attempts to commit suicide.

310. Whoever at any time, after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child stealing by means of, or accompanied with, murder, is a Thug.

Thug.

311. Whoever is a Thug shall be punished with transportation for life, and shall also be liable to fine.

Punishment.

As to the jurisdiction over Thugs, see Cr. P. C., s. 181.

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS.

For commentary on ss. 312–314, see Part II., ss. 441–443.

312. Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Causing miscarriage.

Explanation.—A woman who causes herself to miscarry is within the meaning of this section.

313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing miscarriage without woman's consent.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above-mentioned.

Death caused by an act done with intent to cause miscarriage.

If act done without woman's consent.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

315. Whoever, before the birth of any child, does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Act done with intent to prevent a child being born alive or to cause it to die after birth.

For commentary on ss. 315, 316, see Part II., s. 444.

316. Whoever does any act under such circumstances that, if he thereby caused death, he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing death of a quick unborn child by an act amounting to culpable homicide.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exposure and abandonment of a child under twelve years by *parent* or persons having care of it.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide as the case may be, if the child die in consequence of the exposure.

For commentary on s. 317, see Part II., s. 445.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals, or endeavours to

Concealment of birth by secret disposal of dead body.

conceal, the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

For commentary on s. 318, see Part II., ss. 446, 447.

Of Hurt.

319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

Hurt.

Grievous hurt.

320. The following kinds of hurts only are designated as "grievous":—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction, or permanent impairing, of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

Commentary.

For commentary on ss. 319, 320, see Part II., s. 398.

Where a man was so much injured that he had to go to hospital, but left it perfectly cured on the twentieth day after the hurt, it was held that this day would count as one of the twenty days during which he had been unable to follow his ordinary pursuits. (Reg. *v.* Shaik Bahadur, *Scotland*, C.J., 2nd Madras Sessions, 1862.) Remaining in hospital is evidence from which it may be inferred that a man was unable to follow his ordinary pursuits, but it is not of itself conclusive evidence. (Reg. *v.* Vasta Chela, 19 Bom. 247.)

Voluntarily causing hurt.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Voluntarily causing grievous hurt.

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends, or knows himself to be likely, to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration.

A intending, or knowing himself to be likely, permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

For commentary on s. 322, see Part II., ss. 398, 398A.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Punishment for voluntarily causing hurt.

Commentary.

See as to the summary jurisdiction of the Magistrates of the district over this offence, Crim. P. C., s. 260.

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Voluntarily causing hurt by dangerous weapons or means.

Commentary.

A substance which, if administered in small quantities is not deleterious, will be deleterious if administered in such a quantity as to be dangerous to life, and causing hurt by so administering it, will be punishable under this section. (See Reg. *v.* Cramp, 5 Q.B.D. 307.)

Firing into a crowd with intent to wound some one, supports an indictment which alleges an intent to wound the person who was actually injured. (Reg. *v.* Fretwell, 33 L.J.M.C. 128; S.C. L. & C. 443.)

It is, of course, not necessary for a conviction under this section that the manner in which the weapon has in fact been used should be likely to cause death. That such a misconception has actually occurred is the only reason why I quote authority to guard against its occurring again. (7 Mad. H.C., App. xi.)

Punishment for voluntarily causing grievous hurt.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Voluntarily causing grievous hurt by dangerous weapons or means.

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt to extort property or to constrain to an illegal act.

327. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence (see s. 40, *ante*, p. 13), shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or facilitate the commission of any offence (see s. 40, *ante*, p. 13), or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing hurt by means of poison, etc., with intent to commit offence.

Commentary.

A man placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of detecting an unknown thief who was in the habit of stealing his toddy. The toddy was drunk by some soldiers who purchased it from an unknown vendor. Held that he was rightly convicted under this section of "causing to be taken an unwholesome thing." (Reg. *v.* Dhania, 5 Bom. H.C. C.C. 59.)

In a case under a similar English Statute, where it appeared that the prisoner had administered a drug to a female with intent to excite her sexual passions, in order that he might have connection with her, the conviction was affirmed. (Reg. *v.* Wilkins, 31 L.J.M.C. 72; S.C. L. & C. 89.) But the offence of administering a drug is not committed where the accused has merely procured the drug at the request of another, who took it herself, although the drug was given to her with the knowledge that it would be taken, and for that purpose. (Reg. *v.* Fretwell, 31 L.J.M.C. 145; S.C. L. & C. 161.) Nor, as I conceive, could it be said under such circumstances that the accused had caused it to be taken. Romeo might have been indicted under this section, but not the Apothecary.

The words "other thing" must be read "other unwholesome thing." Hence, administering a substance, as to whose nature no evidence was given, which was intended to act as a charm, was held to be no offence. (Reg. *v.* Jotee Ghoraee, 1 Suth. Cr. 7.) To administer a deleterious drug where life is not endangered, is to commit an offence under this section. (Reg. *v.* Joy Gopal, 4 Suth. Cr. 4.)

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence (see s. 40, *ante*, p. 13), shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence (see s. 40, *ante*, p. 13), or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Voluntarily causing hurt to extort confession, or to compel restoration of property.

Illustrations.

(*a*) A, a Police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section.

(*b*) A, a Police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(*c*) A, a Revenue officer, tortures B in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(*d*) A, a Zemindar, tortures a ryot in order to compel him to pay his rent. A is guilty of an offence under this section.

Commentary.

The confession must be of some offence, or misconduct, under the Code. Hence the extortion of a confession of witchcraft could not fall under this section. (Reg. *v.* Baboo Mundu, 18 Suth. Cr. 23.) It is immaterial whether the offence, or misconduct, have been committed. (Reg. *v.* Nim Chand Mookerjee, 20, Suth. Cr. 41.)

The Madras High Court has ruled that the "demand" in the latter part of the section must relate to property, and that a man was not punishable under this section who caused hurt to his wife, to constrain her to obey his demand that she should return to her house. (Reg. *v.* Ella Boyan, 11 Mad. 257.)

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence (see s. 40, *ante*, p. 13), or misconduct, or for the purpose of constraining the sufferer, or any

Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.

person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt to deter public servant from his duty.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Voluntarily causing grievous hurt to deter public servant from his duty.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt on provocation.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

Causing grievous hurt on provocation.

335. Whoever voluntarily (Act VIII. of 1882, s. 8) causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description

for a term which may extend to four years, or with fine, which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

Punishment for act which endangers life or the personal safety of others.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to two hundred and fifty rupees, or with both.

For commentary on ss. 336, 337, see Part II., s. 431.

Causing hurt by an act which endangers life or the personal safety of others.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to five hundred rupees, or with both.

Causing grievous hurt by an act which endangers life or the personal safety of others.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, which may extend to one thousand rupees, or with both.

Wrongful Restraint and Wrongful Confinement.

Wrongful restraint.

339. Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Wrongful confinement.

Illustrations.

(*a*) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(*b*) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

Commentary.

Where a Superintendent of Police illegally wrote a letter to a person directing him to present himself before a Magistrate, and sent two Constables to accompany him, and prevent him from speaking with any one, this was held to constitute a wrongful imprisonment at Civil law, and, of course, would have been a wrongful confinement under the above section. The Court said:—

"It is manifestly not necessary to constitute imprisonment that there should be a continuous application of superior physical force. In the felicitous language of Mr. Justice *Coleridge*, 'it is one part of the definition of freedom to be able to go withersoever one pleases, but imprisonment is something more than the loss of this power; it includes the notion of restraint within some limits defined by will or power exterior to our own.' (Bird *v.* Jones, 7 Q.B. 742.) It is quite clear, therefore, that the retaining of a person in a particular place, or the compelling him to go in a particular direction, by force of an exterior will, overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will." (Parankusam *v.* Stuart, 2 Mad. H. C. 396.)

And, so, it has been held, that a Police officer who detains a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case, is guilty of wrongful confinement, and that he is not protected by s. 152 of the Crim. P. C., Act XXV. of 1861; s. 124 of Act X. of 1872; s. 61 of the present Code, which authorizes an officer to detain an accused person for 24 hours without sending him before a Magistrate. (Reg. *v.* Suprosunno, 6 Suth. Cr. 88.) It is no defence to a charge under this section that the defendant acted *bonâ fide*, and without malice, and in the belief that the circumstances justified his act. (Dhania *v.* Clifford, 13 Bom. 376).

A person, who puts in motion a ministerial officer who confines another, will be guilty of the wrongful confinement, according as the confinement was his act, or that of the officer. If he states his case to the officer, who thereupon arrests the complainant, this may be a wrongful confinement by the officer, but will not be such by the

informant, even though the latter signs the charge sheet. (Gringham *v.* Willey, 4 H. & N. 296; S.C. 28 L.J. Ex. 243.) If the Police officer absolutely refuses to take the person into custody, unless the informant desires him to do so, then the informant will be guilty of the wrongful confinement, if any such there is. But when the person states his case to a judicial officer, who thereupon, acting on his own judgment, commits the accused to prison, the informant may be guilty of a malicious charge under s. 211, but not of wrongful confinement. (Austin *v.* Dowling, L.R. 5 C.P. 534.) Where a Village Magistrate and Kurnum officially ordered certain persons, who had resisted the detention of animals caught trespassing, to be arrested, they and the Constables who obeyed them were held to have been rightly convicted of wrongful confinement. (5 Mad. H. C., App. xxiv.)

A Police officer, who without warrant arrests a person on a charge of having committed an offence out of British India, with a view to handing him over to the authorities of the foreign state, commits a wrongful act, which is punishable under s. 342 (*re* Mukund, 19 Bom. 72.)

Punishment for wrongful restraint.

341. Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

Punishment for wrongful confinement.

342. Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Wrongful confinement for three or more days.

343. Whoever wrongfully confines any person for three days or more shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Wrongful confinement for ten or more days.

344. Whoever wrongfully confines any person for ten days or more shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement of person for whose liberation a writ has been issued.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of im-

prisonment to which he may be liable under any other section of this Code.

Wrongful confinement in secret.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

Commentary.

Under this section, as in all others, whose essence consists in the existence of a particular intention in the mind of the accused, such intention must be strictly made out. (Empress *v.* Sreenath Banerjee, 9 Cal. 221.)

Wrongful confinement for the purpose of extorting property, or constraining to an illegal act.

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security, or of constraining the person confined, or any person interested in such person, to do anything illegal or to give any information which may facilitate the commission of an offence (see s. 40, *ante*, p. 13), shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement for the purpose of extorting confession, or of compelling restoration of property.

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence (see s. 40, *ante*, p. 13), or misconduct, or for the purpose of constraining the person confined, or any person interested in the person confined, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give any information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Of Criminal Force and Assault.

For commentary on ss. 349, 350, see Part II., ss. 395-397.

Force.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling; provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion, or change, or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move.

Criminal force.

350. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used, is said to "use criminal force" to that other.

Illustrations.

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to Z, and if he has done so without Z's consent in order to the committing of any offence, or intending, or knowing it to be likely, that this use of force will cause injury, fear, or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has

therefore caused force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has, therefore, used force to Z; and as A has acted thus intentionally without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has, therefore, intentionally used force to Z, and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z or with Z's clothes, or with something carried by Z, or that it will strike water and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten, or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here A intentionally uses force to her; and if he does so without her consent, intending or knowing it to be likely that he may thereby frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally, by his own bodily power, causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling; A has therefore intentionally used force to Z, and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to Z, A has used criminal force.

A incites a dog to spring upon Z without Z's consent. Here, if A intends to cause injury, fear, or annoyance to Z, he uses criminal force to Z.

351. Whoever makes any gesture, or any preparation, intending, or knowing it to be likely, that such gesture, or preparation, will cause any person present to apprehend that he who makes that gesture, or preparation, is about to use criminal force to that person, is said to commit an assault.

Assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures, or preparation, such a meaning as may make those gestures, or preparations, amount to an assault.

Illustrations.

(*a*) A shakes his fist at Z, intending, or knowing it to be likely, that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(*c*) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

For commentary on s. 351, see Part II., s. 394.

Punishment for using criminal force otherwise than on grave provocation.

352. Whoever assaults, or uses criminal force to, any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred rupees, or with both.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence—or

If the provocation is given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant—or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence is a question of fact.

For commentary on the law of provocation, see Part II., ss. 415–419.

Using criminal force to deter a public servant from discharge of his duty.

353. Whoever assaults, or uses criminal force to, any person, being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished

with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Commentary.

Resistance to a public officer who is attempting to search a house without the proper written order authorizing him to do so, is not punishable under this section. (Reg. *v.* Narain, 7 N.W.P. 209.) But the fact that a warrant for the arrest of a debtor was only initialled by the officer of the Court, instead of being signed in full under s. 251 of the Civil Procedure Act, is no defence to the debtor who resists arrest. (Reg. *v.* Janki Prasad, 8 All. 293.) See Part II., ss. 204–214, 227.

Assault or use of criminal force to a woman with intent to outrage her modesty.

354. Whoever assaults, or uses criminal force to, any woman, intending to outrage, or knowing it to be likely that he will thereby outrage, her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on s. 354, see Part II., s. 396.

Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation.

355. Whoever assaults, or uses criminal force to, any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempting to commit theft of property carried by a person.

356. Whoever assaults, or uses criminal force to, any person, in attempting to commit theft on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempting wrongfully to confine person.

357. Whoever assaults, or uses criminal force to, any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

358. Whoever assaults, or uses criminal force to, any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to two hundred rupees, or with both.

Assaulting or using criminal force on grave provocation.

Explanation.—The last section is subject to the same explanation as section 352.

Of Kidnapping, Abduction, Slavery, and forced Labour.

359. Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship.

Kidnapping.

360. Whoever conveys any person beyond the limits of British India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

Kidnapping from British India.

361. Whoever takes, or entices, any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Kidnapping from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

For commentary on this section, see Part II., ss. 448–455.

362. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Abduction.

For commentary on this section, see Part II., s. 456.

Punishment for kidnapping.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting, in order to murder.

364. Whoever kidnaps, or abducts, any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(*a*) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(*b*) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

Kidnapping or abducting with intent secretly and wrongfully to confine a person.

365. Whoever kidnaps, or abducts, any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting a woman to compel her marriage, etc.

366. Whoever kidnaps, or abducts, any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on this section, see Part II., s. 457.

Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.

367. Whoever kidnaps, or abducts, any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will

be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Wrongfully concealing or keeping in confinement a kidnapped person.

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person, with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

For commentary on this section, see Part II., s. 458.

Kidnapping or abducting child under ten years with intent to steal movable property from the person of such child.

369. Whoever kidnaps, or abducts, any child under the age of ten years, with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Buying or disposing of any person as a slave.

370. Whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For commentary on ss. 367, 370, 371, see Part II., s. 459.

Habitual dealing in slaves.

371. Whoever habitually imports, exports, removes, buys, sells, traffics, or deals in slaves, shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Selling of any minor for purposes of prostitution, etc.

372. Whoever sells, lets to hire, or otherwise disposes of, any minor under the age of sixteen years, with intent that such minor shall be employed, or used, for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed, or used, for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on ss. 372, 373, see Part II., ss. 461–464.

Buying of any minor for purposes of prostitution.

373. Whoever buys, hires, or otherwise obtains possession of, any minor under the age of sixteen years, with intent that such minor shall be employed, or used, for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Unlawful compulsory labour.

374. Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

For commentary on this section, see Part II., s. 460.

Of Rape.

Rape.

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man, to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under twelve years of age. (Act X. of 1891, s. 1.)

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape. (Act X. of 1891, s. 1.)

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for rape.

For commentary on s. 375, see Part II., ss. 465–478.

Of Unnatural Offences.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Unnatural offences.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Commentary.

A conviction under this section cannot be sustained, when the charge neither stated time nor place, nor pointed to any person with whom the offence was committed, and when the evidence merely proved that the accused went about in woman's clothes, and bore upon his person the physical signs of habitual sodomy. As the Court pointed out, the evidence was at the very least defective in not making out that any offence had been committed within the jurisdiction of the Court. (Reg. *v.* Khairati, 6 All. 204.)

CHAPTER XVII.

OF OFFENCES AGAINST PROPERTY.

For commentary on this chapter, see Part II., Chap. XI., and special references to the following sections.

Of Theft.

378. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property, in order to such taking, is said to commit theft.

Theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving, effected by the same act which effects the severance, may be a theft.

Explanation 3.—A person is said to cause a thing to move, by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person who by any means causes an animal to move is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations.

(*a*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree, in order to such taking, he has committed theft.

(*b*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(*c*) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(*d*) A, being Z's servant and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate without Z's consent. A has committed theft.

(*e*) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not, therefore, be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(*f*) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(*g*) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(*h*) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding-place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(*i*) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(*j*) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft inasmuch as he takes it dishonestly.

(*k*) Again, if A having pawned his watch to Z takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(*l*) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has, therefore, committed theft.

(*m*) A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(*n*) A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z her husband. Here, it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(*o*) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(*p*) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for theft.

For commentary on s. 378, see Part II., ss. 479-501.

See as to the summary jurisdiction of Magistrates over offences under this section, and ss. 380, 381, where the value of the property does not exceed Rs. 50, Crim. P. C., s. 260 (*d*).

Theft in a dwelling-house, etc.

380. Whoever commits theft in any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Commentary.

Where the theft was of a cloth, spread out to dry on the roof of a house, to which the prisoner got access by scaling the wall, it was held that there was no entry into the house, and, consequently, there could neither have been housebreaking nor theft in a house, and that the fact that the roof was used for various domestic purposes could make no difference. (Pro. H.C. Mad., 17th March, 1866; S.C. Weir, 91 [149].) So, a theft from a verandah is not theft in a building. (Mad. H.C. Rul., 28th October, 1870; S.C. Weir, 92 [160].) A cattle-shed is "a building used for the custody of property" within this section. (Pro. H.C. Mad., 24th November, 1866.)

Theft in a house is an aggravated theft, which is not cognizable by heads of villages in the Madras Presidency. (Rulings of High Court of Madras, 1864, on s. 380.)

Theft by clerk or servant of property in possession of master.

381. Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For commentary on s. 381, see Part II., s. 498.

Theft after preparation made for causing death or hurt, in order to the committing of the theft.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(*a*) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment,

having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Of Extortion.

383. Whoever intentionally puts any person in fear of any injury to that person or to any other, thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion."

Extortion.

Illustrations.

(*a*) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field, unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(*d*) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper, and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for extortion.

For commentary on s. 383, see Part II., ss. 502-506.

385. Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Putting person in fear of injury, in order to commit extortion.

386. Whoever commits extortion by putting any person in fear of death, or of grievous hurt to that person, or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

387. Whoever, in order to the committing of extortion, puts, or attempts to put, any person in fear of death, or of grievous hurt to that person, or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed, or attempted to commit, any offence (see s. 40, *ante*, p. 13) punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under section 377, may be punished with transportation for life.

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

For commentary on ss. 388, 389, see Part II., ss. 503, 504.

389. Whoever, in order to the committing of extortion, puts, or attempts to put, any person in fear of an accusation against that person, or any other, of having committed, or attempted to commit, an offence (see s. 40, *ante*, p. 13) punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377, may be punished with transportation for life.

Putting person in fear of accusation of offence, in order to commit extortion.

See note to s. 388.

Of Robbery and Dacoity.

Robbery.

390. In all robbery there is either theft or extortion.

When theft is robbery.

Theft is "robbery," if, in order to the committing of the theft, or in committing the theft, or in carrying away, or attempting to carry away, property obtained by the theft, the offender, for that end, voluntarily causes, or attempts to cause, to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations.

(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has, therefore, committed robbery.

(*b*) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, being at the time of committing the extortion in his presence. A has, therefore, committed robbery.

(*c*) A meets Z and Z's child on the high road. A takes the child and threatens to fling it down a precipice unless Z delivers his purse. Z, in consequence, delivers his purse. Here, A has extorted the purse from Z by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(*d*) A obtains property from Z by saying, "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion and punishable as such, but it is not robbery unless Z is put in fear of the instant death of his child.

For commentary on s. 390, see Part II., ss. 507–510.

Dacoity.

391. When five or more persons conjointly commit, or attempt to commit, a robbery, or where the whole number of persons conjointly committing, or attempting to commit, a robbery, and persons present and aiding such commission or attempt amount to five or more, every person so committing, attempting, or aiding, is said to commit "dacoity."

Commentary.

Where hurt is caused in the commission of a robbery or dacoity it need not be charged as a separate offence, since it is included in the definition of the crime. (Reg. *v.* Abilakh, 1 R.J. & P. 65.) But hurt or grievous hurt voluntarily caused in the commission of a robbery or a dacoity constitutes an aggravation of it, which should be charged under s. 394 or s. 397. See note to s. 394.

Punishment for robbery.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway, between sunset and sunrise, the imprisonment may be extended to fourteen years.

Attempt to commit robbery.

393. Whoever attempts to commit robbery, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Voluntarily causing hurt in committing robbery.

394. If any person, in committing, or attempting to commit, robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing, or attempting to commit, such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Commentary.

The offence defined in s. 391 is included in s. 394, and, therefore, a prisoner who has committed both offences, as part of the same transaction, should be sentenced under s. 394 only. (Reg. *v.* Mootkee, 2 Suth. Cr. 1.)

Punishment for dacoity.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Dacoity with murder.

Commentary.

The High Court of Allahabad has ruled "that to establish a liability to the punishment provided in this section, it is necessary to prove that the person said to be liable was one of the persons who were jointly committing dacoity, and was present when the act of murder in the dacoity was committed." (Reg. *v.* Umrao Singh, 16 All. 437, p. 442.) With great deference to the Court, I cannot see why it is necessary to insert in s. 396 a clause which it does not contain. It will be equally necessary to insert the same words in s. 394. The object of each section appears to be to discourage violence, by rendering every one of the band, by any of whom violence is committed, liable to extra punishment. The section would be rendered idle if those who did not actually use personal violence could avoid the penalty by simply walking aside. This view has accordingly been adopted in a more recent case, where it was held that if the murder was committed in the course of the dacoity, it was immaterial whether it was perpetrated inside or outside the house, or whether the dacoit charged under s. 396 was actually present or not. (Reg. *v.* Teja, 17 All. 86.)

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Robbery or dacoity, with attempt to cause death or grievous hurt.

Commentary.

The liability to enhanced punishment under this section is limited to the offender who actually causes grievous hurt. (Mad. H.C. Rul., 18th March, 1868; S.C. Weir, 99 [171].)

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Attempt to commit robbery or dacoity when armed with deadly weapon.

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Making preparation to commit dacoity.

400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for belonging to a gang of dacoits.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Punishment for belonging to a wandering gang of thieves.

Commentary.

In a case under this section, it is necessary first to prove association; and, secondly, that the association is for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts. (Reg. *v.* Sriram Venkatasami, 6 Mad. H.C. 120; S.C. Weir, 101 [172].) I do not imagine, however, that it would be necessary to prove such acts with the same accuracy as if each was the subject of a charge of theft.

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity.

Of Criminal Misappropriation of Property.

403. Whoever dishonestly misappropriates, or converts to his own use, any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest misappropriation of property.

Illustrations.

(*a*) A takes property belonging to Z out of Z's possession, in good faith believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to

take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misapropriate it. But if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined if he appropriates it to his own use, when he knows or has the means of discovering the owner or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time, in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations.

(*a*) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can

direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs; he aftewards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

For commentary on s. 403, see Part II., ss. 511-513.

404. Whoever dishonestly misappropriates, or converts to his own use, property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Dishonest misappropriation of property possessed by a deceased person at the time of his death.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Commentary.

This section only applies to movable property. (Reg. *v.* Girdhar, 6 Bom. H.C. C.C. 33.)

A conviction under s. 404 or s. 403 will be valid, although the offence really committed was a theft under ss. 378, 380, or 381. (Cr. P. C., s. 237.)

Of Criminal Breach of Trust.

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses, or disposes of, that property in violation of any direction of law prescribing the mode in which such trust is to be

Criminal breach of trust.

discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Illustrations.

(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it should be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lack of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(*d*) But if A, in the last illustration, not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal for Z instead of buying Company's paper,—here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(*e*) A, a revenue officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(*f*) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

For commentary on s. 405, see Part II., ss. 514–517.

Punishment for criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Criminal breach of trust by carrier, etc.

407. Whoever, being entrusted with property as a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

408. Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by a clerk or servant.

For commentary on s. 408, see Part II., ss. 518–521.

409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant, or agent.

Of the Receiving of Stolen Property.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India. (Act VIII. of 1882, s. 9.) But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Stolen property.

For commentary on ss. 410 and 411, see Part II., ss. 522–529.

411. Whoever dishonestly receives, or retains, any stolen property, knowing, or having reason to believe,

ceiving stolen property.

shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Dishonestly receiving property stolen in the commission of a dacoity.

412. Whoever dishonestly receives, or retains, any stolen property, the possession whereof he knows, or has reason to believe, to have been transferred by the commission of dacoity, or dishonestly receives from a person whom he knows, or has reason to believe, to belong, or to have belonged, to a gang of dacoits, property which he knows, or has reason to believe, to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

For commentary on s. 412, see Part II., s. 530.

A commuted sentence of transportation under this section and s. 59 (*ante*, p. 17) cannot exceed ten years. (Reg. *v.* Mohanundo, 5 Suth. Cr. 16.)

Habitually dealing in stolen property.

413. Whoever habitually receives, or deals in, property which he knows, or has reason to believe, to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on s. 413, see Part II., s. 531.

Assisting in concealment of stolen property.

414. Whoever voluntarily assists in concealing or disposing of, or making away with, property which he knows, or has reason to believe, to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

For commentary on s. 414, see Part II., s. 532.

Of Cheating.

Cheating.

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation, or property, is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations.

(*a*) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(*b*) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(*c*) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(*d*) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(*e*) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(*f*) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(*g*) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo-plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo-plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) A intentionally deceives Z into the belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(*i*) A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or morgage-money from Z. A cheats.

For commentary on s. 415, see Part II., ss. 533–550.

Cheat by personation.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

For commentary on s. 416, see Part II., ss. 546, 549.

Punishment for cheating.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect.

418. Whoever cheats, with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Commentary.

This section would apply to cases of cheating by a guardian, trustee, solicitor, or agent, by the manager of a Hindu family, or the Karnaven of a Tarwad in Malabar, or by the directors or managers of a bank in fraud of the shareholders. (Reg. *v.* Moss, 16 All. 88.)

Punishment for cheating by personation.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating and dishonestly inducing a delivery of property.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or any thing which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Of Fraudulent Deeds and Dispositions of Property.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

421. Whoever dishonestly or fraudulently removes, conceals, or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on this section, see Part II., ss. 347–351.

Dishonestly or fraudulently preventing from being made available for his creditors a debt or demand due to the offender.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person, from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on ss. 422, 423, and 424, see Part II., s. 352.

Dishonest or fraudulent execution of deed of transfer containing a false statement of consideration.

423. Whoever dishonestly or fraudulently signs, executes, or becomes a party to, any deed or instrument which purports to transfer, or subject to any charge, any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer of charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent removal of concealment of property.

424. Whoever dishonestly or fraudently conceals, or removes, any property of himself or any other person, or dishonestly or fraudulently assists in the concealment, or removal, thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Of Mischief.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

Mischief.

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(*a*) A voluntarily burns a valuable security belonging to Z, intending to cause wrongful loss to Z. A has committed mischief.

(*b*) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby causing damage to Z. A has committed mischief.

(*e*) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(*h*) A causes cattle to enter upon a field belonging to Z, intending to cause, and knowing that he is likely to cause, damage to Z's crop. A has committed mischief.

For commentary on s. 425, see Part II., ss. 551-554.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Punishment for committing mischief.

Commentary.

A prisoner charged with the theft and killing of two sheep under the value of Rs. 10 can only be dealt with under this section. (Rulings of the Madras Sudder or High Court, 9th May, 1863.)

Mischief such as is described by s. 477 should be charged and tried under that section, as not only the punishment but the jurisdiction is different. (*Re* Madurai, 12 Mad. 54.)

427. Whoever commits mischief, and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Committing mischief and thereby causing damage to the amount of 50 rupees.

Commentary.

See as to the summary jurisdiction of Magistrates over this offence, Cr. P. C., s. 260 (*g*).

428. Whoever commits mischief by killing, poisoning, maiming, or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Mischief by killing or maiming any animal of the value of 10 rupees.

429. Whoever commits mischief by killing, poisoning, maiming, or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by killing or maiming cattle, etc., or any animal of the value of 50 rupees.

Commentary.

It has been held in Madras that a calf does not come within the terms "bull, cow, or ox," and therefore, if not worth Rs. 50, its destruction must be dealt with under s. 425 or s. 428, according to

its value. (Reg. *v.* Cholay, per *Scotland*, C.J., 4th Madras Sessions, 1864.) The Calcutta High Court has recently refused to follow this decision; they said: "It seems to us that the section specifies the more valuable of the domestic animals without regard to age, but in respect of other kinds of animals not so specified the section would not apply, unless the particular animal in question was shown to be of the value of Rs. 50 or upwards." (Hari Mandle *v.* Jafar, 22 Cal. 457.)

Mischief by injury to works of irrigation or by wrongfully diverting water.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property, or for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to public road, bridge, or river.

431. Whoever commits mischief by doing any act which renders, or which he knows to be likely to render, any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by causing inundation or obstruction to public drainage attended with damage.

432. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by destroying or moving, or rendering less useful a lighthouse or sea-mark, or by exhibiting false lights.

433. Whoever commits mischief by destroying, or moving, any lighthouse or other light used as a sea-mark, or any sea-mark, or buoy, or other thing placed as a guide for navigators, or by any act which renders any such lighthouse, sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Mischief by destroying or moving, etc., a landmark fixed by public authority.

434. Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Mischief by fire or explosive substance with intent to cause damage to the amount of 100 rupees.

435. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards, or (where the property is agricultural produce) ten rupees or upwards (Act VIII. of 1882, s. 10), shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Mischief by fire or explosive substance with intent to destroy a house, etc.

436. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship, or as a human dwelling, or as a place for the custody of property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.

437. Whoever commits mischief to any decked vessel, or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in the last section when committed by fire or any explosive substance.

438. Whoever commits or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessels aground or ashore with intent to commit theft, &c.

439. Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein, or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief committed after preparation made for causing death or hurt.

440. Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Of Criminal Trespass.

Criminal trespass.

441. Whoever enters into or upon property in the possession of another, with intent to commit an offence (see s. 40, *ante*, p. 13), or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass."

For commentary on s. 441, see Part II., ss. 555-564.

House-trespass.

442. Whoever commits criminal trespass, by entering into, or remaining in, any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

For commentary on this section, see Part II., 565-568.

Explanation.—The introduction of any part of the criminal trespasser's body in entering sufficient to constitute "house-trespass."

Lurking house-trespass.

443. Whoever commits house-trespass, having taken precautions to conceal such house-trespass from some person who has a right to exclude, or eject, the trespasser from the

building, tent, or vessel which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass by night.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

Housebreaking.

445. A person is said to commit "housebreaking" who commits house-trespass, if he effects his entrance into the house, or any part of it, in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence (see s. 40), or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

First.—If he enters, or quits, through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters, or quits, through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling, or climbing over, any wall or building.

Commentary.

Therefore, a conviction was sustained when the prisoner was caught inside the prosecutor's house at night, and the evidence showed that he could only have effected an entrance by scaling a wall. (Reg. *v.* Emdad Ally, 2 Suth. Cr. 65.)

Thirdly.—If he enters, or quits, through any passage which he, or any abettor of the house-trespass, has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters, or quits, by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Commentary.

Even if a party has got admission into a house through an open door, it will still be housebreaking should he afterwards break, or unlock, any inner door for the purpose of entering any other room. But the mere breaking open of a box, or chest, would not constitute this offence (2 East P. C. 488), though it would be punishable under s. 461.

Fifthly.—If he effects his entrance, or departure, by using criminal force, or committing an assault, or by threatening any person with assault.

Sixthly.—If he enters, or quits, by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself, or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

For remarks on this Explanation, see Part II., s. 569.

Illustrations.

(*a*) A commits house-trespass by making a hole through the wall of Z's house and putting his hand through the aperture. This is housebreaking.

(*b*) A commits house-trespass by creeping into a ship at a portholo between decks. This is housebreaking.

(*c*) A commits house-trespass by entering Z's house through a window. This is housebreaking.

(*d*) A commits house-tresspass by entering Z's house through the door, having opened a door which was fastened. This is housebreaking.

(*e*) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is housebreaking.

(*f*) A finds the key of Z's house-door which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is housebreaking.

(*g*) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is housebreaking.

(*h*) Z, the doorkeeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is housebreaking.

Housebreaking by night.

446. Whoever commits housebreaking after sunset and before sunrise, is said to commit "house-breaking by night."

Punishment for criminal trespass.

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred rupees, or with both.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Punishment for house-trespass.

Commentary.

A sentence for being a member of an unlawful assembly under s. 144 renders unnecessary a separate sentence under this section. (Reg. *v.* Suroop, 3 Suth. Cr. 54.)

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to the commission of an offence punishable with death.

Commentary.

A charge under ss. 449, 450, or 451, must allege and prove an intent to commit an offence punishable in the degrees mentioned therein. Otherwise nothing but the offence of house-trespass remains. (Reg. *v.* Mehar Dowalia, 16 Suth. Cr. 63.)

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to the commission of an offence punishable with transportation for life.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

House-trespass in order to the commission of an offence punishable with imprisonment.

452. Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of

House-trespass after preparation made for causing hurt to any person.

either description for a term which may extend to seven years, and shall also be liable to fine.

Commentary.

A person who, with a forged warrant of arrest, goes into a house and takes away one of the inmates thence against his will under the authority of his warrant, has put that inmate in fear of wrongful restraint. (Reg. *v.* Nund Mohun, 12 Suth. Cr. 33.)

453. Whoever commits lurking house-trespass, or housebreaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Punishment for lurking house-trespass or housebreaking.

454. Whoever commits lurking house-trespass or housebreaking in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Lurking house-trespass or housebreaking in order to the commission of an offence punishable with imprisonment.

455. Whoever commits lurking house-trespass, or housebreaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Lurking house-trespass or housebreaking after preparation made for causing hurt to any person.

456. Whoever commits lurking house-trespass by night, or housebreaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Punishment for lurking house-trespass or housebreaking by night.

Commentary.

One single aggravated offence must not be split up into separate minor offences, *e.g.* lurking house-trespass in order to commit theft under s. 457 into lurking house-trespass under s. 456, and theft under s. 380. (Reg. *v.* Ramchurn, B.L.R. Sup. Vol. 488; S.C. 6 Suth. Cr. 39; F.B. acc.; Empress *v.* Ajudhia, 2 All. 644.)

Nor is it necessary in a charge under s. 456 to allege specifically that the offender had any of the intentions which enter into the definition of criminal trespass by s. 441. If the charge is made under s. 457, the intention must be alleged. (Balmakand Ram v. Ghunsam Ram, 22 Cal. 391.)

Lurking house-trespass or house-breaking by night, in order to the commission of an offence punishable with imprisonment.

457. Whoever commits lurking house-trespass by night, or housebreaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Lurking house-trespass or house-breaking by night, after preparation made for causing hurt to any person.

458. Whoever commits lurking house-trespass by night, or housebreaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

459. Whoever, whilst committing lurking house-trespass or housebreaking, causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

All persons jointly concerned in housebreaking, etc., to be punishable for death or grievous hurt caused by one of their number.

460. If, at the time of the committing of lurking house-trespass by night, or housebreaking by night, any person guilty of such offence shall voluntarily cause, or attempt to cause, death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night, or housebreaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on ss. 458–460, see Part II., s. 569.

461. Whoever dishonestly, or with intent to commit mischief, breaks open, or unfastens, any closed receptacle which contains, or which he believes to contain, property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonestly breaking open any closed receptacle containing or supposed to contain property.

462. Whoever, being entrusted with any closed receptacle which contains, or which he believes to contain, property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open, or unfastens, that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for same offence when committed by person entrusted with custody.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.

For commentary on this chapter, see Part II., Chap. XII., and special references to the following sections.

463. WHOEVER makes any false document, or part of a document, with intent to cause damage, or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Forgery.

For commentary on ss. 463, 464, see Part II., ss. 576–587.

464. A person is said to make a false document—

Making a false document.

First.—Who dishonestly, or fraudulently, makes, signs, seals, or executes a document, or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed,

or executed by, or by the authority of, a person, by whom, or by whose authority, he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; or,

Secondly.—Who, without lawful authority, dishonestly, or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or,

Thirdly.—Who dishonestly, or fraudulently, causes any person to sign, seal, execute, or alter, a document, knowing that such person, by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not, know the contents of the document, or the nature of the alteration.

(*a*) A has a letter of credit upon B for Rupees 10,000, written by Z. A, in order to defraud B, adds a cypher to the 10,000, and makes the sum 100,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase-money. A has committed forgery.

(*c*) A picks up a cheque on a Banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(*d*) A leaves with B, his agent, a cheque on a Banker, signed by A, without inserting the sum payable, and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(*e*) A draws a Bill of Exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a Banker, and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the Banker by leading him to suppose that he had the security of B and thereby to discount the bill, A is guilty of forgery.

(*f*) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B, and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(*g*) A endorses a Government Promissory Note and makes it payable to Z or his order, by writing on the bill the words "Pay to Z or his order," and signing the endorsement. B dishonestly erases the words "Pay to Z or his order," and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(*h*) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(*i*) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(*j*) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(*k*) A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an expressed or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations.

(*a*) A signs his own name to a Bill of Exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(*b*) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a Bill of Exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B knowing the fact draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(*c*) A picks up a Bill of Exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable; here A has committed forgery.

(*d*) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(*e*) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit and with intent to defraud his creditors, and in order to give a colour to the transaction writes a Promissory Note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration.

A draws a Bill of Exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Punishment for forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Forgery of a record of a Court of Justice, or of a public Register of Births, etc.

466. Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a Register of Birth, Baptism, Marriage, or Burial, or a Register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power-of-attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Commentary.

The illegibility of the seal and signature on a forged document purporting to be made by a public servant in his official capacity, will not render a conviction under this section, or s. 471 void. (Reg. *v.* Prosunno, 5 Suth. Cr. 96.)

Forgery of a valuable security or will.

467. Whoever forges a document which purports to be a valuable security, or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the

principal, interest, or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Commentary.

The concoction of a document which upon its face appears to be a mere copy, and which if a genuine copy would not authorize the delivery of money or the doing of any other act referred to in this section, is not chargeable as an offence under s. 467. (Reg. *v.* Naro, 5 Bom. H.C. CC. 56.) Of course, if the document purported to bear the signature of any public officer, authenticating it as a true copy, the forgery of his signature might be an offence under s. 465. A fraudulent alteration of a Collectorate challan is within this section. (Reg. *v.* Harish Chunder, Suth. Sp. Cr. 22.)

Forgery for the purpose of cheating.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Forgery for the purpose of harming the reputation of any person.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Commentary.

Thus, a person who forged a draft petition, with the intention of using it as evidence, and which contained false statements calculated to injure the reputation of a person, was held guilty of an offence under this section. (Reg. *v.* Shifait, 2 B.L.R.. A. Cr. 12; S.C. 10 Suth. Cr. 61.)

A forged document.

470. A false document made wholly or in part by forgery is designated "a forged document."

Using as genuine a forged document.

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

For commentary on s. 471, see Part II., ss. 588–590.

Making or possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467.

472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable otherwise.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Having possession of a valuable security or will, known to be forged, with intent to use it as genuine.

474. Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in section 466, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and, if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For commentary on s. 474, see Part II., s. 591.

475. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467, intending that such device, or mark, shall be used for the purpose of giving the appearance of authenticity to any document then forged, or thereafter to be forged, on such material, or who with such intent has in his possession any material upon, or in the substance of which, any such device, or mark, has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting a device or mark used for authenticating document described in section 467, or possessing counterfeit marked material.

476. Whoever counterfeits upon, or in the substance of, any material, any device, or mark, used for the purpose of authenticating any document other than the documents described in section 467, intending that such device, or mark, shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Counterfeiting a device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.

477. Whoever fraudulently, or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys, or defaces, or attempts to cancel, destroy, or deface, or secretes, or attempts to secrete, any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Fraudulent cancellation, destruction, etc., of a will.

Commentary.

The words "purports to be" bring this section within the English decisions which lay down that a document which is unstamped, and therefore not admissible as evidence, may still be a valuable security,

(7 Mad. H.C., App. xxvii.; S.C. Weir, 123 [215]; Reg. *v.* Ramasami, 12 Mad. 148.) A Puttah is a valuable security for the purposes of this section. (Reg. *v.* Nittar, 3 Suth. Cr. 38.)

Falsification of accounts.

477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed. (Act III. of 1895, s. 4.)

Of Trade, Property and other Marks.

Commentary.

The whole law on Trade, Property and other Marks now rests on the Indian Merchandise Marks Act IV. of 1889 as amended by Act IX. of 1891. The material parts of these Acts as bearing on criminal law are therefore inserted in full.

For commentary, see Part II., ss. 592–601.

Title, extent and commencement.

1. (1) This Act may be called the Indian Merchandise Marks Act, 1889.

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of April, 1889.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(1) "trade mark" has the meaning assigned to that expression in section 478 of the Indian Penal Code as amended by this Act:—

(2) "trade description" means any description, statement or other indication, direct or indirect,—

(*a*) as to the number, quantity, measure, gauge or weight of any goods, or

(*b*) as to the place or country in which, or the time at which, any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to goods being the subject of an existing patent, privilege or copyright;

and the use of any numeral, word or mark, which according to the custom of the trade is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act;

(3) "False trade description" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade-mark or part of a trade-mark shall not prevent such trade description being a false trade description within the meaning of this Act;

(4) "goods" means anything which is the subject of trade or manufacture; and

(5) "name" includes any abbreviation of a name.

3. For that part of Chapter XVIII. of the "Indian Penal Code" which relates to Trade and Property Marks, the following shall be substituted, namely:

Trade-mark.

478. A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark, and for the purposes of this Code the expression "trade-mark" includes any trade-mark which is registered in the register of trade-marks kept under the Patents, Designs and Trade-Marks Act, 1883, and any trade-mark which, either with or without registration, is protected by law in any Brititish possession

or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade-Marks Act, 1883, are, under Order in Council, for the time being applicable.

Property mark.

479. A mark used for denoting that movable property belongs to a particular person is called a property mark.

Using a false trade-mark.

480. Whoever marks any goods, or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark.

Using a false property mark.

481. Whoever marks any movable property or goods, or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Punishment for using a false trade-mark or property mark.

482. Whoever uses any false trade-mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Counterfeiting a trade mark or property mark used by another.

483. Whoever counterfeits any trade-mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counterfeiting a mark used by a public servant.

484. Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or

that the property is of a particular quality, or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Making or possession of any instrument for counterfeiting a trade-mark or property mark.

485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade-mark or property mark, or has in his possession a trade-mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Selling goods marked with a counterfeit trade-mark or property mark.

486. Whoever sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making a false mark upon any receptacle containing goods.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain, or

that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for making use of any such false mark.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

Tampering with property marked with intent to cause injury.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

TRADE DESCRIPTIONS.

[illegible] supplemental to the definition of false trade description.

4. (1) The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied, shall extend to the application to goods of any such numerals, words or marks, or arrangement or combination thereof, whether including a trade-mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such numerals, words or marks, or arrangement or combination, applied thereto.

(2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name" or "initials" means as applied to any goods any name or initials—

(*a*) not being a trade-mark, or part of a trade mark, and

(*b*) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorized the use of such name or initials.

(3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.

Application of trade descriptions.

5. (1) A person shall be deemed to apply a trade description to goods who—

(*a*) applies it to the goods themselves, or

(*b*) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(*c*) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade doscription has been applied, or

(*d*) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

(2) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

Penalty for applying a false trade description.

6. If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months,

or with fine which may extend to two hundred rupees, and in the case of a second or subsequent conviction, with imprisonment which may extend to one year, or with fine, or with both.

Penalty for selling goods to which a false trade description is applied.

7. If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction, with imprisonment which may extend to one year, or with fine, or with both.

Unintentional Contravention of the Law relating to Marks and Descriptions.

Unintentional contravention of the law relating to marks and descriptions.

8. Where a person is accused under section 482 of the Indian Penal Code of using a false trade-mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade-mark or property mark, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to apply trade-marks

or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade-marks or property marks, and that in the case which is the subject of the charge he was so employed, and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

he shall be acquitted.

Forfeiture of Goods.

Forfeiture of goods.

9. (1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade-mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of this Act of applying a false trade description to goods, or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

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Evidence of origin.

13. In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act, or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *primâ facie* evidence of the place or country in which the goods were made or produced.

Costs.

14. (1) On any such prosecution as is mentioned in the last foregoing section, or on any prosecution for an offence against any of the sections of the Indian Penal Code as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

Limitation.

15. No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

of

18. (3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India, who in good faith acts in obedience to the instructions of such master, and, on demand by the prosecutor, has given full information as to his master, and as to the instructions which he has received from his master.

Abetment of offence out of India.

22. If any person, being within British India, abets the commission, without British India, of any act which, if committed within British India, would under this Act, or under any section of that part of Chapter XVIII. of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted. (Act IX. of 1891, s. 4.)

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

Breach of contract of service during a voyage or journey.

490. WHOEVER, being bound by a lawful contract to render his personal service in conveying or conducting any person, or any property, from one place to another place, or to act as servant to any person during a voyage or journey, or to guard any person, or property, during a voyage or journey, voluntarily omits so to do, except in the case of illness or ill-treatment, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine, which may extend to one hundred rupees, or with both.

Illustrations.

(*a*) A, a palanquin-bearer, being bound by legal contract to carry Z from one place to another, runs away in the middle of the stage. A has committed the offence defined in this section.

(*b*) A, a cooly, being bound by lawful contract to carry Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this section.

(*c*) A, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. A has committed the offence defined in this section.

(*d*) A, by unlawful means, compels B, a cooly, to carry his baggage. B, in the course of the journey, puts down the baggage and runs away. Here, as B was not lawfully bound to carry the baggage, he has not committed any offence.

Explanation.—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

Illustration.

A contracts with a Dâk Company to drive their carriage for a month. B employs the Dâk Company to convey him on a journey, and during the month the Company supplies B with a carriage which is driven by A. A in the course of the journey voluntarily leaves the carriage. Here, although A did not contract with B, A is guilty of an offence under this section.

Breach of contract to attend on and supply the wants of helpless persons.

491. Whoever, being bound by a lawful contract to attend on, or to supply the wants of, any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless, or incapable of providing for his own safety, or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to two hundred rupees, or with both.

Breach of contract to serve at a distant place to which the servant is conveyed at the master's expense.

492. Whoever, being bound by lawful contract in writing to work for another person as an artificer, workman, or labourer, for a period not more than three years, at any place within British India, to which, by virtue of the contract, he has been, or is to be, conveyed at the expense of such other, voluntarily deserts the service of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both; unless the employer has ill-treated him or neglected to perform the contract on his part.

Commentary.

It has been held by the High Court of Bengal that the words "during a voyage or journey" govern the whole of s. 490, and, therefore, that breach of a contract to carry indigo from the field to the vats is not punishable under s. 490. (Neeonee *v.* Mullungha, 6 Suth. Cr. 80; and see Saga *v.* Nirunjun, 9 Suth Cr. 12.)

"This section does not apply to servants hired by the month, and under a continuing implied contract to serve until the engagement is terminated by a month's notice." (Rulings of the Madras High Court, 27th March, 1863; S.C. Weir, 123 [216].) Nor to a servant engaged in Madras at a monthly salary who absconded after arriving at Cuddapah. (Mad. H. C. Rulings, 7th January, 1868; S.C. Weir, 124 [216].)

The words "artificer, workman, or labourer" in s. 492 are the same as are found in s. 2 of Act XIII. of 1859. As to these, the Bombay High Court said, "A person who in the ordinary course would himself take part in the work he contracted for is an artificer, workman, or labourer within the scope of Act XIII. of 1859." (*Re* Amirkhan, Bom. H.C. Cr. R., 24th July, 1884; cited Sohoni, Crim. Procedure Code, 3rd ed., 519.) The words include labour skilled and unskilled, such as that of a plantation cooly (3 Mad. H. C. Rulings 25; Reg. *v.* Gaub Gorah, 8 Suth. Cr. 6) or a silk spinner in a factory. (Koonjobehary Lall *v.* Raja Doomney, 14 Suth. Cr. 29.) They do not apply to contracts to serve as domestic servants (Reg. *v.* Soobhoi, 12 Suth. Cr. 26), or to supply wood (Upper Assam Tea Co. *v.* Thopoor, 4 B.L.R., App. I.), or by a butcher to supply skins (7 Mad. H.C. Rulings 13), or to a person who bound himself to another to render to him "service for agricultural and other purposes" for one year (Reg. *v.* Bhagoan Bhivsan, 7 Bom. 379), or to any person who does not undertake personally to do the work, but who only contracts to get it done by some one else. (Gilby *v.* Subbu Pillai, 7 Mad. 100; Caluram *v.* Chengappa, 13 Mad. 351; *re* Balkrishna, 10 Bom. 96.)

In all three sections the essence of the breach of contract is that it should be done voluntarily, that is intentionally. (*Ante*, s. 39.) Of course there is no offence where there is a legal justification for not carrying out the contract. (*Ante*, s. 79; per *Blackburn*, J., in Unwin *v.* Clarke, L.R. 1 Q.B 417, at p. 424.) A man who under a mistake of fact believes that he has given a notice to quit, which, if given, would dissolve the contract, is not liable. (Rider *v.* Wood, 29 L.J.M.C. 1; see per *Blackburn*, J., L.R. 1 Q.B., p. 424.) A man who leaves before his contract has expired, because he is wrongly advised that he is entitled to go, is liable. (Cooper *v.* Simmons, 31 L.J.M.C. 138, at p. 144.)

Under the English Master and Servant Acts (4 Geo. IV., c. 34, and 30 & 31 Vict., c. 14) it has been repeatedly held that an absenting from service, followed by the infliction of a penalty, does not cancel the agreement, and that a renewed or continued absenting can be punished by the infliction of a fresh penalty. (*Ex parte* Baker, 7 E. & B. 697; S.C. 26 L.J.M.C. 193; Unwin *v.* Clarke, L.R. 1 Q.B. 417; Cutler *v.* Turner, L.R. 9 Q.B. 562.) These cases were decided upon the construction of Statutes which contain a procedure before the Magistrate, part of which provides for his cancelling the agreement if he thinks fit. This power is not given by Act XIII. of 1859. Accordingly, in a case under it, the Calcutta High Court decided that a labourer who was punished for absenting himself from service, and who did not return to it, could not be punished again for his continued absence. (Griffiths *v.* Tezia Dosadh, 21 Cal. 262.) If, however, the party returned to service, and so treated the contract as still subsisting, and then broke it again, I do not see why he should not be punished again under Act XIII. of 1859, or under Chapter XIX. of the Code.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

For commentary on this chapter, see Part II., Chap. XIII., and special references to the following sections.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

493. EVERY man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him, and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on ss. 493, 495, 496, see Part II., s. 622.

Marrying again during the lifetime of husband or wife.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts, so far as the same are within his or her knowledge.

For commentary on s. 494, see Part II., ss. 623-634.

495. Whoever commits the offence defined in the last preceding section, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Marriage ceremony gone through with fraudulent intent without lawful marriage.

497. Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be, the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Adultery.

For commentary on s. 497, see Part II., ss. 635–638.

498. Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent, any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Enticing or taking away or detaining with a criminal intent a married woman.

For commentary on s. 498, see Part II., ss. 639–641.

CHAPTER XXI.

OF DEFAMATION.

For commentary on this chapter, see Part II., ss. 642-673, and special references below.

499. WHOEVER, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Defamation.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company, or an association, or collections of persons as such.

For commentary on Explanations 1 and 2, see Part II., s. 648.

Explanation 3.—An imputation in the form of an alternative, or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(*a*) A says, "Z is an honest man; he never stole B's watch;" intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Imputation of any truth which the public good requires to be made or published.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question

For commentary on Exception 1, see Part II., s. 645.

Public conduct of public servants.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no farther.

For commentary on Exceptions 2, 3, 5, and 6, see Part II., ss. 664–667.

Conduct of any person touching any public question.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct, and no farther.

Publication of reports of proceedings of Courts of Justice.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

For commentary on Exception 4, see Part II., s. 662.

Explanation.—A Justice of the Peace, or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Merits of a case decided in a Court of Justice; or conduct of witnesses and others concerned therein.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no farther.

Illustrations.

(*a*) A says, "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no farther.

(*b*) But if A says, "I do not believe what Z asserted at that trial, because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z' conduct as a witness.

Merits of a public performance.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author, so far as his character appears in such performance, and no farther.

Explanation.—A performance may be submitted to the judgment of the public expressly, or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z, "Z's book is foolish, Z must be a weak man. Z's book is indecent, Z must be a man of impure mind." A is within this exception if he say this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no farther.

(*e*) But if A says, "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," A is not within ..... exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Censure passed in good faith by a person having lawful authority over another.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustrations.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

For commentary on Exceptions 7, 8, 9, and 10, see Part II., ss. 649–661.

Accusation preferred in good faith to a duly authorized person.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation.

Illustrations.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father, A is within this exception.

Imputation made in good faith by a person for the protection of his interests.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Illustrations.

(*a*) A, a shopkeeper, says to B, who manages his business, "Sell nothing to Z unless he pays you ready-money, for I have no opinion of his honesty." A is within the exception if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

Caution intended for the good of the person to whom it is conveyed or for the public good.

Tenth Exception.—It is not defamation to convey a caution in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Printing or engraving matter known to be defamatory.

502. Whoever sells, or offers for sale, any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sale of printed or engraved substance containing defamatory matter.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

503. WHOEVER threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Criminal intimidation.

For commentary on s. 503, see Part II., ss. 674–676.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

Intentional insult with intent to provoke a breach of the peace.

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on section 504, see Part II., s. 678.

Circulating false report with intent to cause mutiny or an offence against the State, etc.

505. Whoever circulates or publishes any statement, rumour or report which he knows to be false, with intent to cause any officer, soldier or sailor in the Army or Navy of the Queen, to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for criminal intimidation.

If threat be to cause death or grievous hurt, etc.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Criminal intimidation by an anonymous communication.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat

prisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

508. Whoever voluntarily causes, or attempts to cause, any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing, or attempting to induce, that person to believe that he, or any person in whom he is interested, will become, or will be rendered by some act of the offender, an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Act caused by inducing a person to believe that he will be rendered an object of divine displeasure.

Illustrations.

(*a*) A sits dharna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of divine displeasure. A has committed the offence defined in this section.

(*b*) A threatens Z that unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of divine displeasure. A has committed the offence defined in this section.

For commentary on s. 508, see Part II., s. 677.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Word or gesture intended to insult the modesty of a woman.

For commentary on s. 509, see Part II., s. 679.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine, which may extend to ten rupees, or with both.

Misconduct in public by a drunken person.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

511. WHOEVER attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Attempting to commit offences punishable with transportation or

Illustrations.

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds, after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket; A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

For commentary on s. 511, see Part II., Chapter XV.

PART II.

CHAPTER I.

PRELIMINARY.

I. Origin and Development of Criminal Law, §§ 1—4.
II. Presumption of Innocence, §§ 5—7.
III. Mens Rea, §§ 8—12.
IV. Liability for Acts of Agent, §§ 13—17.

§ 1. CRIMINAL law is the modern equivalent for the law of revenge, by which men protected themselves when there was no one else to protect them. It still survives in the practice of duelling in Europe. Before society existed, every man carried his life in his hands. He was liable at any moment to be attacked in his person or his property, and could only resist by overpowering his opponent. He generally did so by killing him. It was the simplest and most effectual method. The maxim, "A tooth for a tooth, an eye for an eye, a life for a life," though apparently rude, marks a distinct step towards criminal justice. It indicates a sense of proportion and a certain degree of restraint in the dealing between man and man. Still, even this principle could not be enforced without violence, and had the further defect that it generally left bitterness behind it, and gave birth to consequences, such as the vendetta in Corsica and the blood feuds among the Pathans. A further advance was made when the injured party agreed to accept some valuable compensation, in full discharge of all his rights to kill or maim his opponent. The advantages of this system were readily seen, and it developed until a regular sliding scale was fixed as satisfaction for each of the ordinary offences. Even in the case of murder the vengeance of the relatives might be bought off by paying blood money, which of course varied according to the importance of the victim.

§ 2. When matters had got this far, it is evident that the rudiments of a system of criminal law had been reached. Public opinion had begun to act in a recognized direction and according to recognized rules. The next step, viz. that the execution of these rules should be taken out of the hands of individuals and entrusted to State officials, was a very long one, and often was not taken for a very long time. Among the Jews, it does not seem to have been taken at the period of their history described in Leviticus and Deuteronomy. A man who is injured makes his complaint to the elders. The men of the city carry the offender to the gate and stone him to death. The procedure is exactly the same as prevails to-day in America in the mining districts of the Far West, where justice is administered by a Vigilance Committee, and executed by Lynch law. On the other hand, the modern system was in full force in India, so early as the time to which Manu may be attributed. He lays down with perfect distinctness, that the allegiance and revenue which the king claims from his subjects are only the equivalent for the protection which he is bound to extend to them (ix. 302–310). Every day he is to take his seat in his court of justice, and there to decide causes under the eighteen principal titles of law. If he is too busy to do so himself, he is to depute in his place a chief judge and assessors (ix. 1–10). The case is decided, and the punishment awarded by the king or his deputies. When the criminal is condemned to a money payment, this does not go as compensation to the injured person, but as a fine to the king.

§ 3. The modern distinction between civil and criminal law is obviously of later growth. In early society, what we call civil law hardly exists. What a man complains of are direct and deliberate injuries to his person or his property, or to himself in his conjugal relations. The injury is generally attended with violence, and is visited with vindictive and often barbarous punishment. As society becomes more complex, men enter into dealings with each other, and fail to perform their promises. They acquire various rights, and in the exercise of them they come in conflict with the rights of others. There is still an injury which requires redress, but it is felt that there is a difference between a mere injury and a crime. In the latter case, the offender commits an act which he knows to be wrong, which shows that he is a danger to society, and

which makes it necessary that society should treat him as one who has done a wrong to it as well as to the complainant. In the former case the dispute is one between the individuals concerned. If they require it, the State is bound to decide their dispute and enforce its decision, but they may pass the matter over, or patch it up as they like. Hence the broad distinction is established, that in the case of crimes, it is the duty of the State to undertake the prosecution of the offender, and to sentence him on conviction in a way that may operate as a punishment to him and as a warning to others. In the case of civil injuries, the dispute may safely be left in the hands of the parties affected by it, and the object of the ultimate decision is not punishment, but compensation and redress.

§ 4. When this distinction is once established, the number of crimes will increase with the opportunities for them, and also according to the objects which the State proposes for itself. Manu recognizes as crimes, assaults and slander, robbery and other violence, false evidence, theft, criminal breach of trust, cheating, adultery and rape (ix. ss. 6, 119, 191, 193, 352, 364). The numerous other offences which fill the Indian Penal Code were either unknown at that early period, or were of such rare importance as not to call for notice. Had they arisen, they would no doubt have been punished in the same summary way as others. In modern times, however, and especially within the present century, crimes, or offences treated as if they were crimes, have multiplied in an extraordinary manner from the changed view which the State has begun to take of its own functions. Formerly it contented itself with punishing those who committed wilfully wrongful acts. Latterly it has begun to investigate the manner in which its subjects discharge their moral or social duties, and to impose upon them legal restrictions or obligations in the management of their business, and in the treatment of persons dependent on them. These statutes bring the persons affected by them into a completely new relationship to the State, and are enforced by the only machinery at the disposal of the State, viz. that of criminal procedure. This has effected a complete revolution in the conception of criminal law. Formerly, and with some few exceptions, chiefly for the protection of the revenue, it dealt only with acts wrong in themselves and to the knowledge of everybody. At present, criminal law may be said to embrace every act, the doing

of or abstaining from which the State chooses to enforce by the methods and penalties of criminal procedure. Much of the difficulty which has been felt by the English courts in many recent cases, has arisen from an attempt to adapt to the later system the rules which were framed under the former system. The rest of this chapter will be devoted to an examination of some of these rules.

§ 5. **The Presumption of Innocence.**—The rule that every one is presumed to be innocent till he is proved to be guilty, is sometimes spoken of as if it was peculiar to the administration of criminal law. In the Indian Evidence Act, s. 101, illus. (*a*), it is given as a particular instance of the general principle, equally applicable to a suit for ejectment and to a trial for murder, that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." The rule merely means, that a person who is accused of a crime is not bound to make any statement, or to offer any explanation of circumstances which throw suspicion upon him. He stands before the court as an innocent man till he is proved to be guilty. It is the business of the Crown to prove him to be guilty, and he need do nothing but stand by and see what case has been made out against him. As far as the case for the Crown is concerned, he cannot be called upon to take part in the proceeding, except in so far as, for his own protection, the court may question him under s. 342 of the Criminal Procedure Code (see *post*, § 756). If there is a piece of evidence against the prisoner which might be cleared up one way or the other by a word from him, he is not bound to say that word. He is entitled to rely on the defence that the evidence, as it stands, is inconclusive, and that the Crown is bound to make it conclusive without any help from him. For instance, where a woman was indicted for the murder of her child, and it appeared that she was seen with the child at 6 p.m., and arrived at another place without it at 8 p.m., having in the mean time passed a river, and that in that river was found the body of a child, which could not be identified as hers, it was held that she could not be called upon to account for the child till the death was proved, because till then the prosecution had not offered the minimum of evidence necessary for a conviction.[1]

[1] *Reg.* v. *Hopkins*, 8 C. & P. 591, *post*, § 429.

Further, in making out their case, the prosecution have to get rid of every presumption against it; and, to a certain extent, there is a presumption in favour of innocence. The great majority of mankind manage to get through life without committing a crime, and those who assert that a particular person has committed a crime, are asserting a fact against which there is a presumption, which may range from something almost insuperable to something evanescent. Probably no amount of evidence would convince a jury that the Commander-in-Chief, or the Chief Justice, had picked a pocket. In the case of a member of the thieving classes it would be the most natural thing in the world.

§ 6. When the case for the Crown has closed, it is for the prisoner or his advisers to consider whether any case which he need answer has been made out against him. This will depend on the nature of the charge. The definition of every offence must be satisfied by proof, and if this proof fails as regards any necessary item, the whole fails. Assuming the minimum of proof to be supplied, the Crown has offered evidence which may be sufficient for a conviction. The question is, whether it is sufficient. As to this the Evidence Act provides by s. 114, "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case." As an instance, illus. (*a*) states that the court may presume that a person who is in possession of stolen goods, soon after the theft, is either the thief or a guilty receiver, unless he can account for the possession. So if a man is found at night in another man's house, where he has no business to be, the court may assume any particular criminal motive to which the facts may point, without specific evidence of motive.[1] It may be that the evidence is unworthy of belief, or that if believed it is consistent with the innocence of the prisoner, in either of which cases he ought to be acquitted. It may be, however, that if it is believed it is sufficient for a conviction, and then it will be necessary either to contradict it or to explain it away. When matters have reached this point, it is evident that the presumption of innocence has vanished. There is no presumption in favour of the existence of any particular

[1] *Balmakand Ram* v. *Ghansamram*, 22 Cal. 391.

fact which is necessary to make out innocence. If it is necessary for a man's defence to establish an *alibi*, he must prove it.[1] Where a man does an act which is *primâ facie* criminal, but which may be explained away, it is his business to offer the explanation, and to supply the evidence which will prove it.[2] If he relies on the existence of circumstances bringing his case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, it equally lies upon him to prove that the circumstances exist, and till this proof is offered the court will assume that they do not exist.[3]

§ 7. It is a common remark in directing a jury, that if upon the whole case the jury feel any reasonable doubt upon the guilt of the prisoner, they should give him the benefit of the doubt. If this remark goes beyond a truism, it requires to be carefully scrutinized. The nature of proof is defined as follows by the Evidence Act, s. 3:—

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"A fact is said not to be proved when it is neither proved nor disproved."

It is evident that the whole question turns upon this: When should a prudent man act upon the supposition that a fact exists, when he only considers its existence to be probable? This depends, as the Act says, upon the circumstances of the case. Where a man's own interests only are concerned, a prudent man may act upon very slight evidence; where the interests of others are concerned, he will probably require stronger evidence. A prudent man who is asked to take into his service a person who lies under a suspicion of theft, will probably act upon the

[1] Evidence Act, I. of 1872, s. 103, illus.
[2] Evidence Act, s. 106.
[3] Evidence Act, s. 105.

supposition that the charge was true, and refuse to employ him. If the charge is first made after the man has entered his service, he will require stronger evidence to dismiss him on account of it, and still stronger to charge him with the theft. What is the amount of probability upon which a prudent man should act when he is sitting upon a jury? Here, I think, there is a difference between a civil and a criminal case. In a civil case, the interests of two parties are in conflict, and the jury is called in to decide the issue of the conflict. They must decide one way or the other, and they cannot decide either way except upon the balance of evidence. Whatever way they decide, they must injure one party just as, and generally to the same extent as, they benefit the other. The decision of the issue may involve an imputation of perjury to one side or forgery to the other, but the issue itself is merely whether the plaintiff is the owner of a particular piece of land, or whether the defendant signed a promissory note. The facts may be so balanced that each case seems equally probable or improbable, and then the jury simply say that the plaintiff has not satisfied them that he has made out his case. But if there is a substantial preponderance of evidence on either side, though the case may still be full of doubt, the jury must decide as the scale inclines. In a criminal case there is no conflict of interests. The Crown does not wish to convict the prisoner. It only wishes to ascertain whether he has been rightly charged with the offence for which he is tried. It is the interest of justice that if he is guilty he should be convicted, but it is not the interest of justice that he should be convicted unless his guilt is fully and clearly made out. It has often been said that it is better that ten guilty men should escape, than that one innocent man should be convicted. Before accepting the abstract proposition, I should like to know what the guilty men had done, and what was the evidence against the innocent one. But of this I have no doubt, that it is better that ten guilty men should be acquitted, than that one guilty man should be convicted upon insufficient evidence, or by a lax procedure. The only protection to the innocent is that no one, however apparently guilty, should be convicted except in conformity with the strictest rules of law. When therefore it is asked what degree of probability will authorize a jury to convict, I would answer, that they cannot demand such absolute certainty as will exclude every possible doubt, and negative every possible theory;

but they should have arrived at such a degree of moral certainty as will warrant them, in the interests of justice, in taking the risk of being mistaken. That risk, under our system of law, I believe to be quite infinitesimal. No innocent man who is fairly and properly tried can be convicted, except under a combination of adverse circumstances against which no precautions can guard.

§ 8. **Mens rea.**—It is an almost immemorial commonplace of English judges to state that there can be no conviction on a criminal charge, unless the prisoner has a *mens rea*, or guilty mind. The maxim which lays down this doctrine (*actus non facit reum nisi mens sit rea. Non est reus nisi mens sit rea*) has been traced by Sir James Stephen backwards through Lord Coke to the laws of Henry I.[1] Its meaning was discussed with great elaboration in two recent cases,[2] where the judges differed completely as to its application. In the last case, Stephen, J., with characteristic independence, expressed an opinion that the maxim itself was not of much practical value, and was not only likely to mislead, but was absolutely misleading; and in this opinion Manisty, J., who agreed with him in nothing else, most heartily concurred. When the maxim originated, criminal law practically dealt with common law offences, none of which were defined. The law gave them certain names, such as treason, murder, burglary, larceny, or rape, and left any person who was interested in the matter to find out for himself what these terms meant. To do this he had to resort to the explanations of text-writers and the decisions of judges. There he found that the crime consisted, not merely in doing a particular act, such as killing a man, or carrying away his purse, but in doing the act with a particular knowledge or purpose. This superadded mental state was generalized by the term *mens rea*, and the assertion that no one was a criminal unless he had the *mens rea*, really came only to this: that nothing amounted to a crime which did not include all its necessary ingredients.[3] Of course the mental state which had to be established to make out a crime varied with the crime itself. The maxim that every criminal must have a *mens rea* was generally true, but was always valueless. The real

[1] 2 Steph. Crim. L. 94, *n*.
[2] *Reg.* v. *Prince*, L.R. 2 C.C. 151; and *Reg.* v. *Tolson*, 23 Q.B.D. 168.
[3] 2 Steph. Crim. L. 95, *per* Stephen, J., *Cundy* v. *Le Cocq*, 13 Q.B.D. 207; *Reg.* v. *Tolson*, 23 Q.B.D., at p. 187.

question was, whether in each case the accused had the particular *mens rea* which proved him a criminal.

§ 9. Under the Penal Code such a maxim is wholly out of place. Every offence is defined, and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done, knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended. These elements of the crime will be discussed fully hereafter in reference to the special offences of which they form part. It may, however, be material to make some remarks here in regard to intention, motive and knowledge.

Intention.—When a man is charged with an offence, he frequently says that he did not intend to commit it, and apparently supposes that the answer, if believed, would be complete. Does he mean that, in doing the act charged against him, he did not intend to commit a crime; or does he mean that he did not intend to do the act which the law declares to be a crime? In the latter case the plea would generally be a good one. In the former case it would always be bad. It would only mean that he had formed a wrong opinion as to the legal aspect of his conduct, or as to the consequences to himself that might flow from it.[1] For instance, a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence independent of s. 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him, and did not believe the gun would carry so far, this, if a reasonable belief, would negative the criminal intention necessary under s. 299, but would be no answer to a charge under s. 304A, which involves no intention to injure. If he means that he fired at him, mistaking him for another person whom he had no right to kill, this is no defence whatever, as it is merely a description of the offence defined by s. 301. If he means that he fired at him in his house at night, honestly believing him to be a burglar, this would be a good defence under s. 79, as it shows that he has committed no offence. If he

[1] See 2 Steph. Crim. L. 113.

means that he fired at him, intending to wound, but not intending to kill him, this again would be no defence, if the natural result of hitting the man would be to kill him (s. 299). To say that he intended to do a particular act, but did not intend that the ordinary consequences should follow from it, is merely to say that he expected that the laws of nature would be suspended in the particular instance for his convenience (see *post*, §§ 646 and 647).

§ 9A. **Motive.**—Intention must not be confounded with motive. Intention shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger; he neither intends to kill the man nor to do any act which could have that result. Motive is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal. If a man sinks a well in his own land, or sets up a shop next door to one of the same sort, or carries goods at an unremunerative rate, his act does not become unlawful because his motive is to drain the current of water which supplies his neighbour's well, or to undersell and ruin a competitor.[1] An executioner who sought the office for the purpose of gratifying his spite by hanging his enemy, would still be doing a perfectly legal act, if he hung him in a proper way. If the act intended is absolutely illegal it cannot become lawful by being done for an excellent motive. A man who steals the goods or takes the life of another in order to save himself from starving, is not the less committing a criminal offence (*post*, §§ 160, 161). A man who libels another from the loftiest motives is just as criminal as if he had done so for spite.[2] On the other hand, motive is sometimes important as evidencing a state of mind, which is a material element in the offence charged. If a person kills another under the pretext of self-defence, it is essential to consider whether his real motive was to save his own life, or to take a cruel revenge upon a man whom he found in his power (*post*, § 215). If provocation is set up as an extenuation of what would otherwise be murder, the motive under which the

[1] *Bradford* v. *Pickles* (1894), 3 Ch.. p. 68; affd. (1895), A.C. 587; *Mogul Steamship Co.* v. *McGregor* (1892), A.C. 25. See *per* Mellor, J., *Dawkins* v. *Ld. Paulet*, L.R. 5 Q.B., p. 111, *post*, § 655.

[2] *Per* Ld. Coleridge, C.J., 6 Q.B.D., p. 343; *per* Blackburn, J., 7 App. ., p. 777.

act was done is material, as bearing upon the question whether the provocation had deprived the prisoner of self-control (*post*, § 417). So the motive which induces a man to take goods which belong to another will be very material, as showing that he believed the goods were his own, or that he had the owner's consent to taking them. It will be utterly immaterial if it only shows that he took them to prevent the owner making what he considers an improper use of his own property (*post*, §§ 485, 487).

§ 10. **Knowledge.**—Where knowledge of a particular fact is an essential element in an offence, as, for instance, under s. 497 of the Penal Code, it must necessarily be proved. So also, where a fraudulent or dishonest intent is an ingredient, there must be a knowledge of the facts which make the act a fraudulent one. Hence there can be no theft where the property is taken under a *bonâ fide*, though mistaken, claim of right (*post*, § 485). Probably some such knowledge is always required in regard to all crimes properly so called, that is, acts which cannot be done without a sense that it is wrong to do them. There is, however, a large and growing class of statutory offences, where acts previously innocent are forbidden, or acts previously optional are commanded, simply because the State considers such legislation necessary for its own interests, or for the protection of some particular class of the community. Here the object of the State is merely to compel the adoption of a particular line of conduct, and the penalties that are imposed are intended, not for punishment, but for prevention, as the only means which the State has at its disposal for the enforcement of its laws. Now, in regard to such cases, questions have frequently arisen, whether a person is punishable under the statute, when he has violated its provisions in ignorance of the fact on which the violation depends. In some cases of this sort, the judges, influenced by the *mens rea* doctrine, have sought to solve the question by inquiring whether the proceeding was really a criminal proceeding or not.[1] It is now, however, settled that the true test is, "to look at the object of each act that is under consideration, to see how far knowledge is of the essence of the offence created."[2] In arriving at this decision, it has been held

[1] See *Atty.-Gen.* v. *Siddons*, 1 Cr. & J. 220; *Cooper* v. *Simmons*, 31 L.J. M.C. 138, *per* Martin, B., p. 144.

[2] *Per* Stephen, J., *Cundy* v. *Le Cocq*, 13 Q.B.D. 207.

material to inquire: (1) Whether the object of the statute would be frustrated, if proof of such knowledge was necessary. (2) Whether there is anything in the wording of the particular section which implies knowledge. (3) Whether there is anything in other sections showing that knowledge is an element in the offence, which is omitted or referred to in the section under discussion.

§ 11. Hence, upon the first of these grounds, it was held that knowledge was immaterial, where a statute imposed a penalty on any one who shall represent any dramatic production without the consent of the author,[1] or where the acts forbidden were "selling to the prejudice of the purchaser any article of food or drug, which is not of the nature, substance, or quality of the article demanded by such purchaser,"[2] "or having in his possession, and intended for food, meat which was unsound and unfit for man."[3] So, where a statute provided that, "It shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall have been registered under this act," a conviction was supported, where it appeared that several persons had been received into an unregistered house, who were in fact lunatics, but whom the defendant, honestly and on reasonable grounds, believed not to be lunatics.[4]

As instances of the second ground, it has been held, that where a penalty is imposed upon any one who "allows," or "permits," or "suffers" a prohibited act to be done, this implies knowledge of the nature of the act.[5] So it was held that a person could only be convicted of "unlawfully killing pigeons" when he knew the facts which made it unlawful to kill them.[6] The words; "knowingly and wilfully" merely mean that a man did the act, being quite aware what he was about, and what consequences would follow from it.[7] A statute which provides that every one who sends dangerous goods by railway shall distinctly mark their quality outside, assumes the knowledge which would

[1] *Lee* v. *Simpson*, 3 C.B. 871; S.C. 16 L.J. C.P. 105.
[2] *Betts* v. *Armistead*, 20 Q.B.D. 771.
[3] *Blaker* v. *Tillstone* (1894), 1 Q.B. 345.
[4] *Reg.* v. *Bishop*, 5 Q.B.D. 259.
[5] *Massey* v. *Morris* (1894), 2 Q.B. 412; *Somerset* v. *Wade* (1894), 1 Q.B. 574.
[6] *Taylor* v. *Newman*, 4 B. & S. 89; S.C. 32 L.J. M.C. 186.
[7] *Daniel* v. *Jones*, 2 C.P.D. 351.

enable such a description to be given. Therefore it was held that a person could not be convicted who had merely forwarded goods received from their owner with an untrue description upon them, and who had used proper precautions to find out their true character.[1]

As illustrating the third ground: a statute passed for the protection of Government stores, made criminal by s. 1, the concealing, and by s. 2, the possession, of stores marked with the broad arrow. The defendant was charged under s. 2 with the possession of such stores, which were found on his premises in casks which he had lately received, and which had not been opened. There was no evidence that he knew of their contents. It was held that he could not be convicted. Hill, J., said: "The possession in the second section is put in precisely the same category with the concealing, which is a positive act done by the individual, in order to constitute the crime." He also considered that any other construction would reduce the statute to an absurdity.[2] On the other hand, where a person was charged under s. 13 of the Licensing Act, with "selling intoxicating liquor to a drunken person," and it was proved that the person was in fact drunk, but did not appear to be so, and was not believed to be drunk by the person who served him, the conviction was upheld. Stephen, J., relied upon the presence of the word "knowingly" in other sections, and its absence in s. 13, and also on the general policy of the act, to put upon the publican the responsibility of determining whether his customer is sober.[3]

§ 12. These questions will generally arise upon special and local Acts. There are, however, a few sections of the Penal Code in which the prohibition to do an act appears to be absolute, irrespective of the knowledge of the offender as to the facts which make it unlawful.[4] It must be remembered also, that where ignorance is a defence, the proof rests on the person alleging it.[5] In many cases, as in the Merchandise Marks Act, IV. of 1889, ss. 6, 7, 8, the *onus* of proving certain facts is expressly thrown upon the prisoner.

[1] *Hearne* v. *Garton*, 2 E. & E. 66.

[2] *Reg.* v. *Cohen*, 8 Cox. 41; followed *Reg.* v. *Sleep*, L. & C. 44; S.C. 8 Cox. 472.

[3] *Cundy* v. *Le Cocq*, 13 Q.B.D. 207.

[4] See ss. 137, 188, 226, 292, 293, 340 to 344; *Dhania* v. *Clifford*, 13 Bom. 376.

[5] Evidence Act, 1872, s. 106.

§ 13. **Liability of Master for acts of Servant.**—It is a general rule of criminal law that a master is not responsible for the unauthorized acts of his servants.[1] Where, as in most serious crimes, the charge involves proof of a certain state of mind in the person accused (*ante*, §§ 8, 9), it is evident that this cannot be supplied by proof of its existence in the mind of any other person, unless that person was acting in concert with, or under the orders, or at the instigation of the accused.[2] In an old case, Barnes and Huggins were indicted for the murder of a prisoner in the Fleet Prison by placing and keeping him in an unwholesome room. The acts were done by Barnes, the deputy warden of the Fleet. Huggins the warden was once present, and saw the deceased in the room, and turned away. Barnes was held by all the judges to be guilty, and Huggins not. They said: "Though he was warden, yet, it being found that there was a deputy, he is not as warden guilty of the facts committed under the authority of the deputy. He shall answer as superior for his deputy civilly but not criminally. It has been settled that though a sheriff must answer for the offences of his gaolers civilly, that is, he is subject to make satisfaction to the party injured, yet he is not to answer criminally for the offences of his under sheriff. He only is criminally punishable who immediately does the act or permits it to be done. So that if an act is done by an under officer, unless it is done by the command, or direction, or with the consent of the principal, the principal is not criminally punishable for it."

§ 14. As regards the liability of a master for his servant at civil law, "the general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be shown."[3] And provided it was done in the course of his employment, it makes no difference that the act of the servant was not only a civil wrong but a criminal offence.[4] In order to make a master criminally liable, it is necessary to go further, and to show that the injury resulting from

[1] *Per* Pollock, B., *Budd* v. *Lucas* (1891), 1 Q.B., at p. 412; *per* Blackburn, J., *Reg.* v. *Stephens*, L.R. 1 Q.B., at p. 710.

[2] *Reg.* v. *Huggins*, 2 Ld. Raymond, 1574, p. 1580.

[3] *Per* Willes, J., *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, p. 265.

[4] *Dyer* v. *Munday* (1895), 1 Q.B. 743.

the act of the servant can be traced to some personal misconduct or criminal negligence of the master. For instance, a master who puts a servant whom he knows to be incompetent to manage an animal, or a machine, or to discharge any other duty, upon which the safety of others depends, is criminally responsible for the result, as it is one which he ought to have known would probably follow.[1] Where a baker was indicted for supplying unwholesome bread, and it appeared that it was made by his foreman, who used alum to the knowledge of his master, the latter was held to be properly convicted. Bayley, J., said: "If a person employed a servant to use alum or any other ingredient, the unrestrained use of which was noxious, and did not restrain him in the use of it, such a person would be answerable if the servant used it to excess, because he did not apply the proper precautions against its misuse."[2] So where a person fraudulently kept smuggled tobacco, and his manager, upon a search being made on the premises, produced a permit which related to other tobacco, the master was held liable for the wrongful use of the permit. The ground of the decision appears to have been that the master, by employing his servant to commit one fraud on the revenue, authorized him to commit any other fraud that might be required to conceal it.[3] Where, however, a master employs a proper person to do a proper act, he is not criminally responsible if the precautions which he had reason to suppose would be taken are neglected.[4]

§ 15. In many cases the law imposes upon the owner of property the obligation of managing it, so that it shall not injuriously affect any one else or the public, or requires or forbids the dealing with it in some particular way. In such cases, where the breach of obligation is punishable criminally, the owner cannot free himself from liability by delegating the management to some one else on his behalf. This, no doubt, was the principle on which it was held that the proprietor of a newspaper could be indicted for a libel published in it, though he was living at a distance, and knew nothing about the libel till he read it in the paper.[5]

[1] *Reg.* v. *Lowe*, 3 C. & K. 123; *Reg.* v. *Spence*, 1 Cox. 352.
[2] *Reg.* v. *Dixon*, 3 M. & S. 11, p. 14.
[3] *Atty.-Gen.* v. *Siddons*, 1 Cr. & J. 220.
[4] *Reg.* v. *Allen*, 7 C. & P. 153; *Dickenson* v. *Fletcher*, L.R. 9 C.P. 1.
[5] *Reg.* v. *Gutch*, Moo. & M. 433. This has since been altered in England by 6 & 7 Vict., c. 96, s. 7.

The same rule exists in regard to public nuisances. The defendant, who was the owner of a quarry, was indicted for a nuisance caused by the refuse being discharged into a river. It appeared that he was, through age, unable to superintend the works, which were carried on by a manager, and that he and his sons had repeatedly told the workmen to put the rubbish where it could cause no harm. At the trial, Blackburn, J., told the jury that such evidence was immaterial if the nuisance was in fact caused as alleged. This direction and the consequent conviction were sustained by the Court of Crown Cases Reserved, on the ground that the proceeding was not of a strictly criminal nature. Blackburn, J., said: "I only wish to guard myself against it being supposed that either at the trial or now, the general rule, that a principal is not criminally answerable for the acts of his agent, is infringed. All that it is necessary to say is, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie; if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment." [1]

§ 16. **Primâ facie** a general authority to an agent to conduct a lawful business, must be taken to mean an authority to conduct it according to law. The presumption may of course be negatived by showing that the principal had appointed an agent whom he knew to be likely to act in an unlawful manner, or that he had continued to employ him after he had so acted, or that the business was in fact conducted in an unlawful manner for the benefit of the employer, in a way which justified an inference that the latter knew of or connived at it.[2] In the absence of such special circumstances, an employer is not in general answerable criminally for the acts of his servant. There are, however, cases in which a statute expressly orders or forbids the doing of a particular act, and imposes a penalty for disobedience. The great majority of such statutes relate to the mode in which a particular business is to be conducted. In construing such statutes, the liability of an

[1] *Reg. v. Stephens*, L.R. 1 Q.B. 702; *Reg.* v. *Medley*, 6 C. & P. 292.
[2] *Reg.* v. *Holbrook*, 4 Q.B.D. 42, at p. 62; *Massey* v. *Morris* (1894) 2 Q.B. 412; *Atty.-Gen.* v. *Siddons*, 1 Cr. & J. 220.

employer for the act of his agent depends upon exactly the same considerations as those already discussed, in regard to the liability of a man in respect of matters of whose existence he was ignorant (*ante*, §§ 10, 11). Assuming that the employer was not aware that the agent was doing, or likely to do, the act complained of, it is evident that the same question of knowledge arises in a slightly different form. Accordingly, in an English statute which provided that "if the carrier have any pheasant in his possession he shall be convicted," and where the possession was that of one of his servants, it was held unnecessary to aver or prove that he had it in his possession "knowingly." Abbott, C.J., said: "The statute has no such word. If it were necessary to aver that the defendant had actual knowledge, it would cast on the prosecutor a burthen of proof which could not be easily satisfied, particularly as the carriers themselves, usually residing in one place, cannot have any actual knowledge of that which may be done by their servants in the course of a long journey. I am of opinion that it is not a sufficient defence for a carrier in any case of the description, to show that he did not know that the particular parcel contained game, although it might be a good defence to show that it was put into the waggon by the servant for his own benefit, and contrary to the orders and in fraud of of his master."[1] On the other hand, where the Merchant Shipping Act subjected to a penalty, "Any owner or master who allows the ship to be loaded so as to submerge it below a particular line;" the owner was held not to be liable for the act of the master done without his knowledge and assent.[2] Here the word "allow" implied an exercise of personal discretion, and the words "or master" showed that the statute contemplated a case where the master might allow the forbidden act, though the owner did not.

§ 17. The same question has frequently arisen upon the Licensing Acts by which the management of public-houses is controlled. The principle of these Acts was stated by Cave, J., in the last-named case, as follows:—"Licences to keep ale-houses are only granted to persons of good personal character; and it is obvious that the object of so restricting the grant of licences would be defeated if the licensed person could, by delegating the control and

[1] *R.* v. *Marsh*, 2 B. & C. 717.
[2] *Massey* v. *Morris* (1894), 2 Q.B. 412.

management of the house to another person who was altogether unfit to keep it, free himself from responsibility for the manner in which the house was conducted." Accordingly, where an Act imposed a penalty on any licensed person who "supplies any liquor to a constable on duty without authority from his superior officer," the defendant, who was a licensed person, was convicted on proof that his servant had supplied liquor in violation of the clause. Archibald, J., relied on the absence of the word "knowingly," which was contained in the previous clause; Blackburn and Quain, J.J., on the principle that otherwise the Act would be rendered futile.[1] The words "suffer" or "permit" are construed as implying personal knowledge. In reference to clauses containing such words, it has been held that where the householder is present, exercising personal control over the premises, he is not liable for acts which take place without his knowledge or connivance, even though they are known to a servant, upon whom no duty is cast in consequence of such knowledge. If, however, he places another person in complete charge of the premises, or any part of them, then he substitutes that person for himself, he accepts liability for his acts, and the knowledge of that person is his knowledge, and he is responsible as if he had suffered or permitted whatever his delegate suffers or permits. Accordingly, it was held that the landlord, who was busily engaged in another part of the house, could not be convicted for "suffering gaming on licensed premises" when it took place without his knowledge in another room, although a waiter occasionally entered the room to supply drink to the persons who were gaming.[2] On the other hand, where the gambling took place in a skittle-alley attached to the premises, which was placed in entire charge of a servant who managed it and attended upon those who frequented it, and the gambling took place with his knowledge and assent, the landlord was held liable, though he did not know of it, and had instructed the manager to prevent it.[3]

Sections 154 and 155 of the Penal Code impose a penalty upon the owner of land in certain cases where a breach of duty is committed by his agent or manager.

[1] *Mullins* v. *Collins*, L.R., 9 Q.B. 292.

[2] *Somerset* v. *Hart*, 12 Q.B.D. 360.

[3] *Bond* v. *Evans*, 21 Q.B.D. 249; following *Redgate* v. *Haynes*, 1 Q.B.D. 89, where the landlord went to bed, leaving the hall porter in charge.

CHAPTER II.

LOCAL EXTENT OF INDIAN JURISDICTION.

I. Extradition, § 19.
II. Extraterritorial Jurisdiction.
1. Offences committed on land, §§ 27, 30—38.
2. ,, ,, sea, §§ 28, 39.
Admiralty Jurisdiction, §§ 39, 40, 46—48.
3. Persons liable to jurisdiction, §§ 44—60.
Piracy, §§ 61—67.
4. Law applicable to offence, §§ 68—80.

§ 18. **Application of Penal Code.**—So far as India and the persons resident therein are concerned, the primary intention of the Legislature is to substitute the Penal Code for the criminal law which previously existed. That law, however, is not repealed, except by implication, and in cases to which the provisions of this Code apply. The frame of these clauses is thus explained by the Commissioners in their Second Report, 1847, ss. 536—538.

"We do not advise the general repeal of the Penal laws now existing in the territories for which we have recommended the enactment of the Code. We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court Martial) for any acts which constitute any offence defined in the Code, otherwise than according to its provisions. It is possible that a few actions which are punishable by some existing law, and which the Legislature would not desire to exempt, may have been omitted from the Code. And, in addition to this consideration, it appears to us that actions which have been made penal on special temporary grounds, ought not to be included in a general Penal Code intended to take its place amongst the permanent institutions of the country."

The object is carried out as regards offences committed within the territories by s. 2, which is explicit enough.

With regard to offences committed beyond those territories the Code is less clear. Section 3 enacts that where a person might, by virtue of any Act of the Legislative Council of Calcutta, be tried in British India for an offence committed out of British India, he is to be dealt with according to this

Code. Section 4 contains a similar provision as to servants of the Queen who commit offences within the dominions of allied Princes. But neither of these sections covers an equally important class of cases, that, namely, of persons who are not servants of the Queen, and who are triable in British India, not by virtue of any Act of the Legislative Council, but under Acts of Parliament. These will be governed by the law contemplated by the Act of Parliament which gives jurisdiction over them in India.

§ 19. **Extradition.**—Offences committed beyond the limits of British India may either be tried in India, or the offender may be given up for trial in the country where his crime was committed.

Cases of the latter class will now be disposed of under the Foreign Jurisdiction and Extradition Act, XXI. of 1879. It seems to contemplate two distinct cases. *First*, where the offence has been committed in any of those States specially connected with India, in which the Governor-General in Council has a power and jurisdiction which is exercised by a Political Agent (s. 3). *Secondly*, where the offence is committed in some State where there is no such Indian jurisdiction, or in some other part of Her Majesty's dominions.

First.—"When an offence has been committed, or is supposed to have been committed, in any State against the law of such State by a person not being an European British subject, and such person escapes into, or is in British India, the Political Agent for such State may issue a warrant for his arrest and delivery at a place in such State, and to a person to be named in the warrant, if such Political Agent thinks that the offence is one which ought to be inquired into in such State, and if the act, said to have been done, would, if done in British India, have constituted an offence against any of the sections of the Indian Penal Code mentioned in the second Schedule hereto, or under any other section of the said Code, or any other law, which may, from time to time, be specified by the Governor-General in Council by a notification in the Gazette" (s. 11).

The sections mentioned in the second Schedule are the following:—206, 208 (frauds upon creditors); 224 (resistance to arrest); 230—263, both inclusive (coin); 299—304 (homicide); 307 (attempt to murder); 310, 311 (Thugs); 312—317 (injuries to infants); 323—333 (hurt); 347, 348 (wrongful confinement); 360—373 (kidnapping); 375—377 (rape and unnatural offences); 378—414 (offences

against property); 435—440 (mischief); 443—446 (house-trespass; 464—468 (forgery); 471—477 (frauds in regard to documents).

"Such warrant may be directed to the Magistrate of any district in which the accused person is believed to be, and shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants; and the accused person, when arrested, shall be forwarded to the place and delivered to the officer named in the warrant" (s. 12).

"Such Political Agent may either dispose of the case himself, or if he is generally or specially directed to do so by the Governor-General in Council, or by the Governor in Council of Fort St. George or of Bombay, may give over the person so forwarded, whether he be a native Indian subject of Her Majesty or not, to be tried by the ordinary courts of the State in which the offence was committed" (s. 13).

It will be observed that the Political Agent is not authorized to demand the extradition of an European British subject. He must apparently be dealt with in India under the Crim. P.C., Act X. of 1882, s. 188.

The arrest by a police officer in India of a person charged with having committed an offence in a Native State, with a view to handing him over to be dealt with by the authorities of that State, if made without a warrant is illegal, and punishable under s. 342 of the Penal Code."[1]

§ 20. *Secondly.*—Extradition, as between the British Government and non-Asiatic States, is only granted by virtue of some treaty, which again requires an Act of Parliament, or a Local Act to give effect to it.[2] As regards India, such demands are most likely to arise between our Government, on one hand, and the Governments of Portugal and France on the other.

Portugal.—The Portuguese Treaty Act, 1880 (IV. of 0), provides for delivery by each of the contracting parties to the other of persons who, being accused or convicted of crimes committed in the Indian dominions or jurisdiction of the one party, shall be found in the Indian dominions or jurisdiction of the other. When the crime for which extradition is claimed has been committed beyond the dominions of the party claiming, the requisition shall

[1] *Re Makund*, 19 Bom. 72.
[2] *Per* Mellish, L.J., L.R. 5 P.C. 189; Forsyth, 341, 369.

be complied with, if the laws of the party applied to authorize a prosecution for such crime when committed beyond its dominions, and if the person claimed is a subject of the party claiming his extradition. The offences for which extradition shall be granted by either party are set out in a Schedule. It is provided that no person who is a British subject by birth or naturalization shall be given up to the Portuguese authorities. And similarly that no Portuguese subject shall be delivered up to the British authorities. Also that the person surrendered shall not be kept in prison or brought to trial by the party to whom the surrender is made, for any other crime, or on account of any other matters, than those for which the surrender has been granted.

§ 21. **France.**—The Treaty with France (August 14, 1876) is very similar, but contains a special clause which is not found in the Portuguese convention, that no extradition shall be granted for any political offence, or any act connected with a political offence. These words are not limited to offences against the State, such, for instance, as those in Chapter VI. of the Penal Code. Nor do they include crimes merely attributable to political feeling, such as the assassination of the Czar, or the dynamite outrages of the anarchists. But they mean that fugitive criminals are not to be surrendered for crimes which are specified in the extradition treaties, if those crimes were incidental to and formed a part of political disturbances; as, for instance, the shooting of a soldier who was engaged in putting down an insurrection, or the destruction of property to form a barricade.[1] Where extradition was demanded in England of a French anarchist, who was charged with causing explosions at a café in Paris, Cave, J., held that this was not a political offence. "In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice upon the other, and if the offence is committed by one side or the other, in pursuance of that object, it is a political offence, otherwise not."[2]

§ 22. The treaty of 1876 expressly preserves the treaty of March 7, 1815, relating to the East Indian possessions of Great Britain and France, which would probably be the one resorted to in the case of fugitive criminals in India. It

[1] 2 Steph. Crim. Law, 70, *re Castioni* (1891), 1 Q.B. 149.
[2] *Re Meunier* (1894), 2 Q.B. 415, at p. 419.

declares that "all Europeans and others whatsoever, against whom judicial proceedings shall be instituted within the limits of the said settlements or factories belonging to His Most Christian Majesty for offences committed or debts contracted within the said limits, and who shall take refuge out of the same, shall be delivered up to the chiefs of the said settlements and factories; and all Europeans and others whatsoever, against whom judicial proceedings as aforesaid shall be instituted without the said limits, and who shall take refuge within the same, shall be delivered up by the chiefs of the said settlements and factories, upon demand being made of them by the British Government."[1]

§ 23. The modern practice in extradition treaties is to name specifically the offences for which each party undertakes to deliver up offenders to the other. In such cases no extradition can be granted, unless the facts alleged constitute an offence against the laws of the harbouring, as well as of the claimant party, within the terms of the treaty. It is not sufficient that the same name is given by each State to different things.[2] Even where general words are used, such as in the French treaty of March 7, 1815, the same general principle is applied. A treaty with China bound the Government of Hong Kong to surrender any Chinese subject "who has committed, or is charged with having committed, any crime or offence against the laws of China." It was held by the Judicial Committee, that these words ought to be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China.[3] Again, the special condition against surrender of political offenders is a general principle of international law, which has from the earliest times been acted on by all nations which are powerful enough to resist the demand. A remarkable instance in recent times was the refusal of Turkey, in which she was supported by England, to surrender to Austria and Russia their subjects who had taken part in the Hungarian insurrection of 1849.[4]

§ 24. In a recent case in Bombay, where, under an agreement between the British Government and a Native State

[1] As to extradition with *Mysore*, see *post*, § 37; *Baroda*, treaty of 1885, art. 16, 6 Aitchison, 324; *Central India*, 4 Aitchison, 195—197; *Hyderabad* sunnud, July 10, 1861, 5 Aitchison, 117; *Nipal* treaty, February, 1855, arts. 4—7, 2 Aitchison, 221.

[2] *Re Windsor*, 34 L.J. M.C. 163; *re Bellencontre* (1891), 2 Q.B. 122.

[3] *Atty.-Gen.* v. *Kwok-A-Singh*, L.R. 5 P.C., p. 198.

[4] Forsyth, 371.

for the surrender of offenders, a man had been demanded from the Native State as being charged with dacoity, and was subsequently tried and convicted of theft, the High Court held that the conviction was good, inasmuch as there was nothing in the extradition treaty which provided that a person surrendered on one charge should not be tried on another.[1] Even if there had been an express stipulation to that effect, it is difficult to see how that could have invalidated the conviction. The court which tries a prisoner has nothing to do with the mode by which he has fallen into the hands of justice. Its business is to see that he has been legally committed for an offence within its jurisdiction, and that his trial is conducted according to law. It is the business of the Government to see that it does not break faith with the surrendering State. If it does, that is a matter for complaint by the State which has given up the offender. If, however, as in the case of the Portuguese Treaty, the stipulation is embodied in a statute which binds the tribunal, it would probably be held that it had no jurisdiction to try the offender on any other charge. In *Reg.* v. *Nelson*, Cockburn, C.J., in charging the grand jury, said, evidently with reference to *Reg.* v. *Sattler*:[2] "Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have no extradition treaty, so that we could not get him delivered up to us by the authorities; and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands on him, and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a magistrate; the magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said, 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.'"[3]

[1] *Reg.* v. *Khoda Uma*, 17 Bom. 369.
[2] 27 L.J. M.C. 48; D. & B. 525, *post*, § 437.
[3] Cockburn, p. 118. See too *per* Lopes, J., *Reg. v. Hughes*, 4 Q.B.D., at p. 622.

§ 25. The Extradition Act, 1870 (33 & 34 Vict., c. 52), is in terms only applicable to the United Kingdom, but s. 17 provides that it may be extended to any British possession (s. 26) by order in Council, and the extending order may either suspend any existing law on the subject which prevails in such possession, or may direct that such law shall have effect as part of the Extradition Act, either with or without alteration (s. 18). This treaty applies to all persons of whatever nationality they may be, except subjects of the State from which extradition is required, who have committed any of the specified crimes within the jurisdiction of the State which demands the extradition.[1]

This Act and the Amending Act (36 & 37 Vict., c. 60, s. 4) contain provisions which practically make all warrants, depositions, or affirmations prove themselves, if purporting to be issued by the authorities of the country which demands the offender, and to be signed by a judge, magistrate or officer of the Foreign State, whose signature is either proved by oath, or authenticated by an official seal, of which all courts are to take notice (s. 15). The Indian Evidence Act, I. of 1872, s. 82, enables similar documents to be proved in the same way, if produced in India. By s. 33 of the Indian Evidence Act, depositions of witnesses who have been examined in presence of the accused in the country where he was committed for trial, but who cannot be compelled to attend in the country where he is actually tried, may be used against him at his trial.[2]

§ 26. The machinery for carrying out all demands for extradition made upon the Indian authorities, is provided by Act XXI. of 1879, s. 14, as follows :—

"Whenever a requisition is made to the Governor-General in Council or any Local Government, by or by the authority of the persons for the time being administering the Executive Government of any part of the dominions of Her Majesty, or the territory of any Foreign Prince or State, that any person accused of having committed an offence in such dominions or territory should be given up, the Governor-General in Council or such Local Government, as the case may be, may issue an order to any magistrate, who would have had jurisdiction to inquire into the offence, if it had been committed within his local jurisdiction, directing him to inquire into the truth of such accusation.

[1] *Reg.* v. *Ganz*, 9 Q.B.D. 93. [2] *Empress* v. *Dossaji*, 3 Bom. 334.

The magistrate so directed shall issue a summons or warrant for the arrest of such person, according as the offence named appears to be one for which a summons or warrant would ordinarily issue; and shall inquire into the truth of such accusation; and shall report thereon to the Government by which he was directed to hold such inquiry. If, upon receipt of such report, such Government is of opinion that the accused person ought to be given up to the persons making such requisition, it may issue a warrant for the custody and removal of such accused person, and for his delivery at a place, and to a person to be named in such warrant."

It is also provided by Act IX. of 1895, s. 2, that "all powers vested in, and acts authorized or required to be done by, a police magistrate or any justice of the peace in relation to the surrender of fugitive criminals in the United Kingdom under the Extradition Acts, 1870 & 1873, are hereby vested in, and may in British India be exercised and done by any presidency magistrate or district magistrate in relation to the surrender of fugitive criminals under the said Acts."

§ 27. **Extraterritorial Jurisdiction on Land.**—It is now necessary to examine the cases in which the Indian courts have jurisdiction in respect of crimes committed out of India.

By the common law of England, the courts in England have no jurisdiction over a British subject in respect of crimes committed by him on land out of England. The reasons appear to have been, because such an act could not be said to be done "against the peace of the king's realm, his Crown and dignity;" and also because the courts could only try a crime by means of a jury *de vicineto*, that is, summoned from the district in which the act took place. Subsequently various statutes were passed enabling the courts to try treason, murder, and manslaughter committed on land by a British subject abroad. The Court of Queen's Bench is also a statutory tribunal for the trial of abuse of official authority by persons acting under royal commission beyond the realm.[1] From about the sixteenth century, commercial settlements and factories came to be established in non-Christian and partly civilized nations, and there by treaty, usage or sufferance, our right to exercise civil and criminal jurisdiction over persons within the limits of such

[1] 2 Steph. Crim. L. 14.

settlements or factories by means of local tribunals came to be recognized. These tribunals have in the present reign received a Parliamentary sanction by the Foreign Jurisdiction Acts of 1843, 1865, 1866 and 1878. Under an order in council for courts of the dominions of the Porte, the courts of Constantinople and Egypt may in special cases forward natives of India for trial to Bombay.[1]

§ 28. **Admiralty Jurisdiction.**—Jurisdiction in regard to offences committed at sea stood on quite a different footing. From the earliest times English ships were found in every part of the known world. Control over them and their crews, and those who had dealings with them, was vested in the Lord High Admiral, and he, by his local deputies or vice-admirals, took cognizance of all crimes committed on British ships. The objection to this was, that proceedings in the Admiralty Court were governed by civil law, so that unless the accused plainly confessed the charge laid against him, it must be proved by two witnesses who saw the offence committed. In general also the case was tried without a jury. This led to the passing of an Act, 28 Hen. VIII., c. 15, by which all offences cognizable by the admiral were to be dealt with according to the course of the common law, as if they had been committed on land, in places within the realm, by commissions directed to the admiral or his deputy, and three or four other substantial persons named by the king. These persons were in practice judges of the common law courts. By 11 & 12 Will. III., c. 7; and 46 Geo. III., c. 54, the king was authorized to issue commissions to persons in any colony or foreign possession of the Crown to try any offence committed on the sea, according to the common course of the laws of this realm used for offences committed on land. Finally, in 1834, by the Central Criminal Court Act (3 & 4 Will. IV., c. 36, s. 22), that court was empowered to try all offences committed within the jurisdiction of the admiralty, and in 1844 it was provided by the 7 & 8 Vict., c. 2, that all commissioners of oyer and terminer, or gaol delivery, should have all the powers which commissioners under the Act of Hen. VIII. would have as to trial of offences committed at sea.[2] It will be observed that none of these acts did away with admiralty jurisdiction. They merely directed that it should be exercised by particular

[1] 2 Steph. Crim. L. 58—60.
[2] 2 Steph. Crim. L. 16—21; 1 Russ. 20, note *b*.

persons or courts, and that the same law and procedure should be applied as if the acts complained of had been committed in an English county.[1]

§ 29. **Indian Jurisdiction.**—As regards the trial by Indian authorities of offences committed out of India, it must be remembered that the Indian courts are essentially courts of local jurisdiction, and have no power to try any person for a crime committed out of India, unless by some special provision authorizing them to do so. When such a crime has been committed, and the offender is within Indian jurisdiction, it is necessary to inquire: *first*, what courts can take cognizance of the offence; *secondly*, what persons are triable by those courts; and, *thirdly*, what law is to be applied to ascertain the offence, and to determine its penalty. Further, different considerations apply according as the offence has been committed on land or on sea.

§ 30. *First.*—As regards offences committed on land, Act XXI. of 1879, s. 8, provides that the law relating to offences and to criminal procedure for the time being in force in British India shall, subject to such modifications as the Governor-General in Council from time to time directs, extend to all European British subjects in the dominions of Princes and States in India in alliance with Her Majesty, and to all native Indian subjects of Her Majesty in any place beyond the limits of British India. It has accordingly been held that the High Court of Bombay had authority, under s. 526 of the Criminal Procedure Code of 1882, to transfer for trial before itself a case of defamation pending before the court of the cantonment magistrate of Secunderabad.[2] The Criminal Procedure Code of 1882, s. 188, declares that "When a European British subject commits an offence in the dominion of a Prince or State in India in alliance with Her Majesty, or when a native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India, he may be dealt with, in respect of such offence, as if it had been committed at any place within British India at which he may be found." But where the offence was committed in a Native State which possesses a Political Agent, he must certify that the offence is one which ought to be tried in British India. Any proceedings taken thereupon will be a bar to proceed-

[1] *Reg.* v. *Keyn*, 2 Ex. D., pp. 169, 209.
[2] *Reg.* v. *Edwards*, 9 Bom. 333.

ings for the same offence under Act XXI. of 1879, in any territory beyond the limits of British India, exactly as they would have been if the offence had been committed in India.[1]

§ 31. Under this section native Indian subjects, who were found in Ahmedabad, were convicted there of the offence of breach of trust as carriers, committed by them in Goa.[2] Under the repealed Act XI. of 1872, s. 9, a native Indian subject who committed a murder in Cyprus was held triable in Agra.[3]

§ 32. **Native Indian Subject.**—As regards the question, Who is a native Indian subject? the following case lately arose. The family of the accused belonged to Bakool, in Baroda. His grandfather took service in British territory, at Kalol, retaining a house at Bakool, and having another, where he generally resided, at Kalol. The father of the accused lived almost entirely at Kalol, and was also in the service of the British Government. He married a wife from Baroda, and the accused was born there in the territory of the Gaikwar. The accused was educated partly in Kalol, and subsequently at Baroda, and he also entered the British service. He committed an offence in the allied State of Cambay, and being found in Ahmedabad, was tried there and convicted. His conviction was reversed. It was held upon these facts that he was a natural-born subject of Baroda; that he had done nothing to alter his nationality; and that neither his residence in India, nor his service under the British Government, made him a native Indian subject. As a servant of the Queen, he was punishable under s. 4 of the Penal Code; but this section, though it determines the mode of punishment, does not give the Indian Courts jurisdiction over an offence committed beyond their limits.[4]

§ 33. The above provisions relate to cases where the offender, having committed an offence out of British India, is afterwards found within British India. Where the offender remains in the country where his offence was committed he must be dealt with under s. 6 of the Foreign

[1] The power of the Indian Council to legislate for persons out of India is derived, as to British subjects within the allied States, from 28 & 29 Vict., c. 17, and as to native Indian subjects, from 32 & 33 Vict., c. 98.

[2] *Reg.* v. *Daya Bhima*, 13 Bom. 147.

[3] *Reg.* v. *Sarmukh Sing*, 2 All. 218.

[4] *Reg.* v. *Natwarai*, 16 Bom. 178.

Jurisdiction Act (XXI. of 1879), which authorizes the Governor-General in Council to appoint in places out of British India justices of the peace, who shall have, in proceedings against European British subjects, or persons accused of having committed offences conjointly with such subjects, all the powers conferred by the Code of Criminal Procedure on magistrates of the first class who are justices of the peace and European British subjects. The Governor-General in Council is by the same section authorized to direct to what court having jurisdiction over European British subjects such justice of the peace may commit for trial. By statute 28 & 29 Vict., c. 16, the Governor-General in Council was empowered to authorize any of the High Courts established under 24 & 25 Vict., c. 104, to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the Princes and States of India in alliance with Her Majesty as the said Governor-General in Council may, from time to time, determine. In pursuance of this power a Notification, No. 178 J, was issued by the Governor-General in Council on the 23rd September, 1874, which allotted to the High Courts of Fort William, Madras, Bombay and the North Western Provinces the Original and Appellate Criminal Jurisdiction to be exercised over European British subjects of Her Majesty, being Christians, resident in the several Native States therein mentioned. To Madras was given jurisdiction over such persons resident in Mysore, Travancore, Cochin, Pudukottai, Banganapalle and Sandur.[1] By further Notifications of the same date, Nos. 180, 181 J, it was directed that the agents to the Governor-General in Rajputana and Central India should not exercise the powers of a High Court within the districts previously specified in cases where the accused were European Christian British subjects.

§ 34. There seems to be some difficulty as to the mode in which an offence committed by a European British subject residing in the above districts is to be dealt with, where the offence is one which, under the Crim. P. C. (Act X. of 1882, ss. 446—449), would be disposed of by committal to the Sessions Court, if the offender were resident in British India. By Notification, No. 179 J (23rd September, 1874), the Governor-General directed that all justices of the

[1] *In re Hayes*, 12 Mad. 39.

peace within the districts above specified should commit to the High Courts respectively having jurisdiction under Notification 178 J, such European British subjects as are required by Act X. of 1872 (now Act X. of 1882) to be committed to a High Court. But no such subject need be committed to a High Court unless he is accused of an offence punishable with transportation or death. For minor offences, not within the competency of the committing magistrate to punish himself, the course under the Crim. P.C. is to commit to the Sessions Court. For such cases no provision seems to be made by the existing Notification. This difficulty was pointed out by the Madras High Court in a recent case,[1] and it was suggested that "inasmuch as this court has been duly constituted a Court of Original Jurisdiction to take cognizance of offences committed by European British subjects, being Christians, it may be that in the absence of any special direction a commitment to this court would be a good commitment."

§ 35. **Mysore.**—The great and growing importance of our legal relations with Mysore has induced me to seek for special information on the subject. The following memorandum has been communicated to me by Mr. Thumboo Chetty, late Chief Judge of Mysore. His high official position gives it a judicial authority, which adds to the obligation he has conferred on me by allowing it to form a part of this work.

European British Subjects in Mysore.

The law relating to European British subjects within the territories of Mysore is now regulated by para. 17 of the Instrument of Transfer drawn up by the Government of India on the 1st March, 1881, on the occasion of the installation of His Highness the Maharaja on the 25th March, 1881. Para. 17 is as follows:—

"Plenary criminal jurisdiction over European British subjects in the said territories shall continue to be vested in the Governor-General in Council, and the Maharaja of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated by the Governor-General in Council."

Subsequently, when introducing, with the approval of the Governor-General in Council, into the territories of Mysore, the Code of Criminal Procedure, Act X. of 1882,

[1] *Ward* v. *The Queen*, 5 Mad., p. 33.

by Regulation I. of 1886, it was declared in s. 1 (of Regulation I. of 1886) that "all provisions (in Act X. of 1882) relating "to the appointment, suspension, removal and the powers of "the justices of peace shall be omitted. Nothing herein "contained shall be deemed to confer any jurisdiction in "proceedings against European British subjects." The result of this state of law was that the magistracy and police in Mysore were not even able to arrest European British offenders for offences committed by them in Mysore. To remedy this state of affairs, the following Notification, No. 20, dated 7th April, 1886, was issued, with the approval of the Governor-General in Council:—

"With reference to Regulation I. of 1886, introducing "into the territories of Mysore the Code of Criminal Pro- "cedure (Act X. of 1882), and in accordance with the "decision of His Excellency the Viceroy and Governor- "General of India in Council, communicated in letter No. "482–1895 of the 4th March, 1886, from the Officiating "Resident in Mysore to the Dewan of Mysore, His High- "ness the Maharaja is pleased to notify that until further "orders—

"(*a*) the expression 'jurisdiction' in section I. of the "Regulation shall be held to mean jurisdiction "to inquire into or try a charge; and

"(*b*) that the police officers and magistrates in Mysore "may, with respect to European British subjects, "exercise the same powers as may be exercised "with respect to European British subjects by "police officers and magistrates who are not "justices of the peace respectively in places "in British India, beyond the limits of the "presidency towns."

§ 36. The procedure now in force in British India for the trial of European British subjects is that laid down in ss. 443—459, Act X. of 1882. The present state of law applicable to European British subjects within the territories of Mysore is clearly laid down in Government of *Mysore* v. *Fuller* (Criminal Revision Case, No. 150 of 1887, on the file of the Chief Court of Mysore).[1]

[1] In this case Mr. Fuller was summoned to appear before the District Magistrate of Tumkur, Mr. Kristna Murti, to answer a charge under s. 352, I.P.C. In reply to questions put to him by the magistrate, he stated that he was a European British subject, but that he did not claim to be dealt with as such. He was then tried and sentenced to

Sessions.

In exercise of the powers conferred by s. 6 of Act XXI. of 1879, the Governor-General in Council has directed that justices of the peace within the State of Mysore shall commit European British subjects for trial to the High Court at Madras.—(Government of India, Foreign Department, Judicial, No. 159, I. J., dated 21st July, 1881, Simla.)

Calendars.

Justices of the peace in Mysore are requested to submit the calendar of all cases tried by them to the High Court of Madras.—(Government Proceedings, No. 3738–63—Cir. 65, dated 1st July, 1891.)

Justices of the Peace in Mysore.

In exercise of the powers conferred by s. 6 of Act XXI. of 1879, the Governor-General in Council has from time to time appointed the following gentlemen to be justices of the peace within the State of Mysore :—

(1) The Resident in Mysore for the time being, being a European British subject.
(2) The Chief Judge of Mysore for the time being, being a European British subject.
(3) The District Magistrate of the Civil and Military station for the time being, being a European British subject; and seven other gentlemen specially appointed by name.

§ 36A. **Trial of Persons other than European British subjects.**

a fine. On revision it was held by the Chief Court that the magistrate had no jurisdiction, even by consent. "The Notification No. 20 of 7th April, 1886, conferred upon magistrates in Mysore who were not justices of the peace, the same jurisdiction in respect to European British subjects which could be exercised by similar magistrates in British India. The procedure now in force in British India is that laid down by ss. 443—459 of Act X. of 1882. Under those sections, the special qualification necessary to give a magistrate jurisdiction over a European British subject is that he must be a justice of the peace, and also a European British subject. The District Magistrate of Tumkur is neither a justice of the peace nor a European British subject. He is, therefore, incompetent to inquire into, or try a European British subject." "The powers which are conferred on magistrates in Mysore are powers ancillary to the administration of justice—powers to apprehend offenders and to bind them over to appear before competent tribunals, but not to sit in judgment over them" (5 Mysore Rep. 281).

—1. Persons employed in the Postal or Telegraph Service within the Mysore territories are public servants as defined in the Indian Penal Code. This was enacted by Regulation II. of 1894, which is as follows:—

"Whereas it is expedient to amend the Indian Penal Code (Act XLV. of 1860) as it is in force in the territories of Mysore, His Highness the Maharaja is pleased to enact as follows:—

To s. 21 of the said Code, the following shall be added, namely:—

Eleventh.—"Every officer employed in the Postal or Telegraph Service established or maintained by the British Indian Government within the territories of Mysore."

2. Section 119 of Regulation IV. of 1894 declares that "(1) Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX. of the Indian Penal Code; (2) in the definition of 'legal remuneration' in section 161 of that Code, the word 'Government' shall, for the purpose of sub-section (1), be deemed to include any employer of a railway servant as such; and (4) notwithstanding anything contained in section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in sub-section (1)."

§ 37. **Extradition.**—Section 16 of the Instrument of Transfer is as follows:—

"The Maharaja of Mysore shall cause to be arrested and surrendered to the proper officers of British Government any person within the said territories accused of having committed an offence in British India, for whose arrest and surrender a demand may be made by the British Resident in Mysore or some other officer authorized by him in this behalf, and he shall afford every assistance for the trial of such persons by ensuring the attendance of witnesses required and by such other means as may be necessary."

The 2nd para. of s. 503, Act X. of 1882, as amended by Regulation I. of 1886, is as follows:—

"When the witnesses (for whose examination a commission has to be issued) reside in British India, the commission may be issued to any court competent to execute it under section 19 of the Foreign Jurisdiction and Extradition Act XXI. of 1879. All persons residing in the territories of Mysore, whose attendance may be required by an officer executing a commission for the examination of witnesses

issued to him by a criminal court in British India under the 2nd paragraph of section 503 of the Code of Criminal Procedure, Act X. of 1882, shall be bound to appear before such officer and answer truthfully all questions which he may put to them for the purpose of executing such commission, and shall be liable to the same penalties for default in this respect as they would be liable to, had their attendance been required by a criminal court within the territories of Mysore."

§ 38. A further and special provision is contained in the Slave Trade Act (39 & 40 Vict., c. 46, s. 1) which makes the commission, or abetment, of offences under ss. 367—370 and 371 of the Indian Penal Code, punishable in the same way as if they had been committed in any place in British India within which the offender may be found, provided he was a subject of Her Majesty, or of any allied Indian Prince, even though the offence itself was committed on the high seas or in any part of Asia or Africa specified by order of Council.[1] Special powers of issuing commissions to obtain evidence are given to the High Courts under s. 3.

§ 39. **Offences committed on the High Seas** are triable by Admiralty jurisdiction, and by a series of provisions which form part of the Merchant Shipping Code.

Admiralty jurisdiction was originally conferred upon the Supreme Courts by their respective charters, and by 33 Geo. III., c. 52, s. 156, and 53 Geo. III., c. 155, s. 110, and was continued to the High Courts by 24 & 25 Vict., c. 104, s. 9, and by ss. 32 & 33 of the Letters Patent of 1865. Under Act XVI. of 1891, s. 2, the High Courts of Bengal, Madras, and Bombay are declared to be Colonial Courts of Admiralty, within the meaning of stat. 53 & 54 Vict., c. 27. The High Court of Allahabad has no such jurisdiction under its Letters Patent of 1866. The effect of these statutes is to confer upon those courts the same jurisdiction as is possessed by the Admiralty Court of England, in respect of all offences committed in all places, and by all persons over whom that court would have had jurisdiction.

Till lately the Mofussil Courts have had no similar jurisdiction. Now by the combined effect of the Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96, and 23 & 24 Vict., c. 88, s. 1, it is enacted, "That if any person in British India shall be charged with the commission of any

[1] *Empress* v. *Dossaji*, 3 Bom. 334.

treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature soever, committed upon the sea, or in any haven, river, creek, or place where the admiral has power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to British India, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in India shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of British India would and ought to have been had and exercised, or instituted and carried on by them respectively, if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of British India, and within the limits of the local jurisdiction of the Courts of Criminal Justice. Provided always, that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to, in case such offence had been committed, and were inquired of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding" (12 & 13 Vict., c. 96, ss. 1, 2).

§ 40. Further provisions of a similar character are contained in the Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, which consolidated the former Acts on the same subject. Of the following sections, 686 embodies the provisions of 18 & 19 Vict., c. 91, s. 21, and of 30 & 31 Vict., c. 124, s. 11; and s. 687 is identical with 17 & 18 Vict., c. 104, s. 267.

686 (1). Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not

belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

(2). Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96.

687. All offences against property or person committed in or at any place ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, and determined, and adjudged in the same manner, and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.[1]

The preceding sections of the Merchant Shipping Act, 1894, ss. 684 and 685, are limited to offences created by that Act. I call attention to their limited purpose, as the language of s. 685, taken by itself, might seem to authorize everything that was attempted to be done in the case of *Reg.* v. *Keyn*.

Lastly, it is provided by s. 3 of the Colonial Courts Act (37 & 38 Vict., c. 27) that "when by virtue of any Act of Parliament, now or hereafter to be passed, a person is tried in a court of any colony (which includes India, s. 2), for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by such Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any

[1] See as to such costs, 7 Geo. IV., c. 64, s. 27, and 7 & 8 Vict., c. 2, s. 1.

Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment), as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

§ 41. A special criminal jurisdiction was conferred upon the Supreme Courts, and has now passed to the High Courts, by 9 Geo. IV., c. 74.[1] This statute, by s. 1, "shall extend to all persons and all places, as well on land as on the high seas, over whom or which the criminal jurisdiction of any of His Majesty's courts of justice, erected or to be erected within the British territories under the government of the East India Company, does or shall hereafter extend."

By s. 56, "Where any person being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon the land or at sea, within the limits of the charter of the said United Company, shall die of such stroke, poisoning, or hurt at any place without those limits, or being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon land or sea, shall die of such stroke, poisoning, or hurt at any place within the limits aforesaid, any offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired, tried, determined, and punished by any of His Majesty's courts of justice within the British territories under the government of the said United Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the court within the jurisdiction of which such offender shall be apprehended or be in custody."

§ 42. The application of s. 56 is limited by s. 1 to persons who, at the time of the committal of the offence, were subject to the original criminal jurisdiction of the court by which they are tried. Some Burmese native subjects of the East India Company committed a murder on the Coco Islands, which are uninhabited islands in the Bay of Bengal, within the charter, which was held to mean the trading

[1] These provisions have been left untouched by the Statute Law Revision Acts, 1873 and 1874.

charter of the East India Company. They were convicted under the above statute by the Supreme Court of Calcutta; but this conviction was reversed by the Privy Council. It was held that the place in which the offence was committed was, but that the offenders personally were not, within the jurisdiction conferred by the statute; that the object of the statute was "only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and partly completed in another, to the East Indies, and not to make a new enactment rendering persons liable for a complete offence, who would not have been liable before." It was also laid down that "the words of the section do not apply to entire offences, begun and committed within the jurisdiction, but to those partly committed within and partly without, which are put on the same footing as if they had been wholly committed within the jurisdiction."[1] The trading charter referred to in this statute was that of William III., dated 5th September, 1698, and extended from the Cape of Good Hope to the Straits of Magellan.

§ 43. **Found within Jurisdiction.**—A person is "found within the jurisdiction" of a court when he is actually present there, whether he came there voluntarily or not, or even when he was brought there illegally. This was so held in the case of *Reg.* v. *Sattler*.[2] Sattler was a foreigner who had committed larceny in England, and who then went with the stolen property to Hamburgh. There was no extradition treaty with Hamburgh, but the deceased, an English police officer, went to Hamburgh, and there arrested him with the help of the Hamburgh police, and put him on a steamer for England. Sattler murdered him on the steamer, and when it arrived in London he was tried for the murder in the Central Criminal Court. It was held that he was "found within the jurisdiction" of that court, though the putting him on board the steamer, and bringing him to London, was unlawful, in the sense that it could not be justified either by foreign or English law.

§ 44. *Secondly*.—**As to the persons triable** by the Indian courts under the above Acts. It will be observed that Act XXI. of 1879, s. 8, and the Crim. P. C., s. 188, confer jurisdiction in certain cases over a "European British subject,"

[1] *Nga Hoong* v. *Reg.*, 7 M.I.A. 72, pp. 101, 103.
[2] 27 L.J. M.C. 48, D. & B. 525.

while the Merchant Shipping Act, 1894, ss. 686, 687, gives jurisdiction over "any British subject." These phrases are not synonymous. The former is the term which, as defined by the Crim. P. C., 1882, s. 4 (4), describes any white-skinned subject of the British Crown, to whom special privileges are awarded under that Code. The latter is an ambiguous term. It used to be employed in the earlier statutes relating to India in the same restricted sense as the former phrase. But its ordinary meaning is that of a person who owes allegiance to the British Crown by birth or naturalization.[1] Accordingly, upon the construction of a Criminal Statute 9 Geo. IV., c. 31, s. 7, the words "His Majesty's subject" and "British subject" were treated by the court as synonymous terms, in dealing with a native of Malta, who murdered a Dutchman in Smyrna.[2] It seems clear that the word *British*, when qualifying *subject*, in the Merchant Shipping Act, must mean the same thing as it does when qualifying *ship*, and in either case must be taken simply as opposed to foreign. The restricted meaning of the term would become important for the first time when the question arose, what court in India was to try the prisoner? For instance, suppose an English sailor and a Malabar coolie, returning from the West Indies, join in robbing a passenger on board a British ship while it is in a foreign port, and are arrested when they reach India; both would be amenable to the jurisdiction of the Indian courts, as being in the general sense British subjects. But the Englishman, as being a British subject in the restricted sense, could, in general, only be tried before the High Court, while the coolie might be tried by any Court in the Mofussil within whose jurisdiction he was found, provided it was capable of taking cognizance of theft.

Where a person, charged under Act 12 & 13 Vict., c. 96, has, and claims, the privilege of being tried by the High Court, "The court exercising criminal jurisdiction shall certify the fact and claim to the Governor of such place, or chief local authority thereof, and such Governor, or chief local authority, shall thereupon order and cause the said person charged to be sent into custody to such one of the Presidencies as such Governor shall think fit, for trial before the Supreme (High) Court of such Presidency, and the said Supreme Court, and all public officers and other persons in

[1] *eg.* v. *Manning*, 2 C. & K. 900.
[2] *Reg.* v. *Azzopardi*, 2 C. & K. 203.

the Presidency, shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed. within the limits of the ordinary jurisdiction of such Supreme Court" (23 & 24 Vict., c. 88, s. 2).

§ 45. As regards offences committed out of India, native Indian subjects of the Crown are punishable in India, whether the offences have been committed on shore or on land. So by Act XXI. of 1879, s. 8, and by the Crim. P. C., 1882, s. 188 (*ante*, § 30), European British subjects are only punishable where the offence has been committed on land, if within the territories of the Native States in alliance with the Crown, which, though not in India, are treated by our legislation as forming part of its suburbs. Where the offence is committed on land beyond those limits, no person, not being a native Indian subject, is amenable to the Indian courts, unless his crime, being murder or manslaughter, can be brought within the provisions of 9 Geo. IV., c. 74, s. 56, or unless it has been committed by a person described by the Merchant Shipping Act of 1894, s. 687 (*ante*, § 40). No foreigner can ever be liable to any British jurisdiction for any offence committed by him on land out of British dominions, even though the act committed by him takes its operation within British territory. Even the statutes which give a tribunal jurisdiction over an offender found within its limits, in respect of an act begun outside those limits which has produced its effect within the limits, does not apply to the case of a foreigner. Such statutes are merely rules of procedure, which enable a particular court to try an offender who, at the time he committed the act, was amenable in respect of it to some British court.[1] Sir James Stephen thinks that the Merchant Shipping Act, 1854, s. 267 (now s. 687 of the Act of 1894, *ante*, § 40), would give British courts jurisdiction over a foreigner who came within its terms in respect of acts done by him on foreign territory.[2] The point was treated as doubtful, unless where the act was done on sea, by the judges in *Reg.* v. *Anderson*, L.R., 1 C.C. 161.

§ 46. **Admiralty Jurisdiction.**—As regards offences committed on sea, the most important jurisdiction is that

[1] *Reg.* v. *Lewis*, 26 L.J. M.C. 104; *Reg.* v. *Parthai*, 10 Bom. H.C. 356; *Nga Hoong* v. *Reg.*, 7 M.I.A. 72, p. 103.

[2] 2 Steph. Crim. L. 12.

possessed by the Admiralty, whose origin and growth has been already described. Admiralty jurisdiction only takes cognizance of acts committed on the sea, and, in respect of crimes, only of those which become complete at sea. The admiral has no jurisdiction over murder, where the wounding was on sea but the death happened on shore.[1] And so it was held in Madras that a master of a ship who received rice at Mangalore for conveyance to Calicut, and took his ship to Goa, where he sold the rice and embezzled the money, was not triable under stat. 12 & 13 Vict., c. 96, as he committed no offence upon the sea, nor any at all till he got on shore at Goa.[2] Conversely, where a wrongful act done on shore produces a criminal result at sea, the offence is cognizable by the Admiralty, not by the court within whose limits the offender was residing. A gunner in St. James's Fort, at Barbadoes, fired a gun at a vessel which was leaving the port, for some supposed breach of the Custom rules. He killed one man and wounded another. The Attorney and Solicitor-General, Sir Philip Yorke and Sir Clement Wearg, advised the Crown (in 1725) that the gunner could not be tried by any court of common law, but only by the Admiralty.[3]

§ 47. Admiralty jurisdiction begins where the tide touches the shore, whether at low or high-water mark, and extends all over the world, to the coast of every country, and up every bay, arm of the sea, and river, so far as great ships go. It is not necessary to show that the tide reaches the spot if it is accessible to ocean-going vessels. For instance, the admiral was held to have jurisdiction over offences committed in an English ship lying at Wampu, in China, twenty or thirty miles from the sea,[4] and similarly in another vessel lying in the Garonne, ninety miles from the sea.[5] Nor does it make any difference that the ship is actually within a foreign port. Admiralty jurisdiction has been held to apply to all on board an English ship which was moored to the quay at Rotterdam, and was as completely within the port as a ship would be if lying in the Pool below London

[1] 1 Hale, P.C. 17; 1 Comyn, Digest, 498.
[2] *Bapu Daldi* v. *Reg.*, 5 Mad. 23.
[3] Forsyth, 219, following 1 Hawk. P.C. 254, s. 16; *Combe's* case, 1 Leach, C.C. 388; *Reg. v. Keyn*, 2 Ex. D., p. 102.
[4] *Reg.* v. *Allen*, 1 Mood. C.C. 494.
[5] *Reg.* v. *Anderson*, L.R. 1 C.C. 161.

Bridge, or in the Hooghly opposite Calcutta.[1] The place must, however, be part of the continuous navigable water which extends upwards from the open sea. Where an American ship was lying in an enclosed dock in Havre, into which the water was admitted at the will of the owners, Mr. Justice Story held that the Admiralty jurisdiction did not apply. He said, "The place where the ship lay was in no sense the high seas. The Admiralty has never held that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark."[2]

§ 48. **Concurrent Jurisdiction.**—The common law courts of England in early times claimed concurrent jurisdiction with the Admiralty in respect of offences committed upon the narrow seas, on the ground that they were actually within the realm of England. This was the ground on which we asserted the right to compel foreign ships of war to lower their flags before ours in those seas. Since the time of Edward III., however, it has been admitted that the common law courts had no jurisdiction beyond the limits of the county, which only extended to low-water mark. Beyond these limits the jurisdiction of the admiral was exclusive.[3] Where, however, a river, bay, or arm of the sea extended inland in such a manner that the space covered with water could properly be considered as an actual portion of England, then the counties on each side were considered to extend to the middle of the intervening water, and it made no difference that the water itself was tidal and navigable. In such a case it was held by Lord Coke and others that the jurisdiction of the admiral was ousted.[4] Lord Hale, however, was of opinion that even in such a case the Admiralty had concurrent jurisdiction with the common law courts—at all events, in cases of murder and maiming—and exclusive jurisdiction over piracy, which was not triable by any common law court, as being essentially an offence committed at sea, and recognized only by the civil law.[5] This view has been accepted in later times.[6] The only question which can arise in regard to it is, When may it be said that such an intervening space is part of

[1] *Reg. v. Carr*, 10 Q.B.D. 76.
[2] *United States v. Hamilton*, 1 Mason, 152.
[3] 2 Hale, P.C. 12; *Reg.* v. *Keyn*, 2 Ex. D., pp. 67, 79, 162, 197, 239.
[4] 2 East, P.C. 803.
[5] 2 Hale, P.C. 16.
[6] *Per* Cockburn, C.J., *Reg.* v. *Keyn*, 2 Ex. D., p. 168.

English territory? Lord Hale, in his treatise, "De Jure Maris," says, "that arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." Hawkins, however, considers the rule more accurately confined by other authorities to such parts of the sea, where a man standing on the side of the land may see what is done on the other.[1] Probably no strict rule can be laid down; each case must be judged on its own facts. For instance, where an offence was committed in the Bristol Channel, at a point where it is ten miles from shore to shore, and where on a clear day one shore is visible from the other, it was held that the whole Channel was within the limits of the adjacent counties, and that the common law jurisdiction extended to a case of wounding committed on a ship lying three-quarters of a mile from the county in which it was tried. Cockburn, C.J., said, "Does not the jurisdiction of the county of Glamorgan extend to the *medium filum aquæ* between Glamorgan and Somerset? Is not the whole of the Bristol Channel between those counties within the limits of England?"[2] On the other hand, the Admiralty jurisdiction was maintained where a murder was committed on a ship within the body of a county, viz. in Milford Haven, eight miles from its mouth, and where it was only three miles from shore to shore.[3] A similar decision was given where the offence was committed in a bay within the county of Galway.[4] In England the question of jurisdiction is practically unimportant; in India it may be a matter of considerable importance, as affecting the law by which the case will be governed.

§ 49. As regards persons, Admiralty criminal jurisdiction extends (I.) to all British subjects at sea; (II.) to all persons on any ship which by reason of nationality or situation was subject to British jurisdiction when the offence was committed; (III.) to all persons charged with committing piracy *jure gentium*, irrespective of nationality or place.

I. When we speak of a British subject committing an offence at sea, we mean, of course, on board some ship. In

[1] 2 East, P.C. 804; 6 Bac. Abr. 166.
[2] *Reg.* v. *Cunningham*, 24 L.J.M.C. 66; Bell, C.C. 72.
[3] *Reg.* v. *Bruce*, Leach, 1093.
[4] *Reg.* v. *Mannion*, 2 Cox, C.C. 158.

general, this would be a British ship. There is a remarkable absence of authority as to the jurisdiction over a British subject, for offences committed on a foreign ship out of Her Majesty's dominions; as, for instance, if he committed an offence while he was on a British ship which took effect on a foreign ship; or if he left a British ship to which he was attached, committed an offence on a foreign ship, and then returned to his own. In the case of *United States* v. *Davis*,[1] the master of an American ship which was lying in harbour in one of the Society Islands, fired a gun from his own ship, and thereby killed a foreigner in a schooner which lay alongside. The schooner belonged to a resident of the Society Islands. The master was brought to trial in a court in Massachusetts. It was held that the American court had no jurisdiction. Story, J., following *Coombe's* case,[2] considered that the offence was committed on the schooner, which was a foreign vessel, and subject to foreign jurisdiction, and that as the act was not a piratical act the prisoner was liable to no other jurisdiction. He declined, however, to remand him for trial to the foreign jurisdiction, saying that such a course was never pursued.

Cockburn, C.J., commented upon this case in *Reg.* v. *Keyn*,[3] and doubted whether it was rightly decided. He suggested that a continuing act might be considered to be an offence equally in the jurisdiction in which it originated, and that in which it took effect. No such suggestion could be made if he left his own ship, and committed the entire offence on a foreign ship, though if he committed murder or manslaughter on land out of the Queen's dominions, he might be punished in any county or place in England or Ireland in which he might be in custody (24 & 25 Vict., c. 100, s. 9).

§ 50. The ordinary Admiralty jurisdiction is supplemented as regards masters, seamen, and apprentices employed at the time of, or within three months before the offence, on board a British vessel, by s. 687 of the Merchant Shipping Act, 1894. It makes them punishable for any offence against person or property committed at any place afloat or ashore out of Her Majesty's dominions (*ante*, § 40). This, of course, would cover the case just suggested. So the Merchant Shipping Act, 1894, s. 686 (*ante*, § 40) gives jurisdiction over any British subject who commits any crime or offence on board any foreign ship *to which he does not belong*.

[1] 2 Sumner, 482. [2] 1 Leach, C.C. 388. [3] 2 Ex. D., p. 234.

A person belongs to a ship if he is one of the ship's company under the orders of the master. It seems very questionable whether a passenger does belong to it. So far as either belongs to the other, the ship belongs to him. If, therefore, an English passenger and an English engineer employed on a French steamer severally committed offences on their way out to India, the former could on arrival be punished by a British court, the latter could not. He would have to be sent back to France for trial.

§ 51. **Territorial Jurisdiction.**—II. Every person who is found within a foreign State is subject to and punishable by its law. The English lawyers put this on the principle that a person who enters a State becomes entitled to the protection of its law, and is therefore bound to render it obedience. The more obvious reason is, that no State can tolerate the presence within it of a person who is not subject to some law, and no law can be administered to him but the law of the State. Every ship, so long as it is on the high seas, is part of the territory of the country whose flag it flies. So completely is this the case that a child born on an English ship is considered, for all legal purposes, as born in England.[1] Hence a foreigner, who commits an offence upon an English ship, whether he is permanently or merely casually on board, is liable to the Admiralty jurisdiction. In the case of *Reg.* v. *Anderson*,[2] an American citizen, serving on board an English ship, which was at the time in the Garonne on her way to Bordeaux, committed manslaughter upon another American citizen serving on the same ship. It was held that his offence was triable under the Admiralty jurisdiction, without reference to the provisions of the Merchant Shipping Act, 1854, s. 267. A stronger case was that of *Reg.* v. *Carr*.[3] There some bonds had been stolen from an English ship while it was moored to a floating derrick attached to the quay at Rotterdam. The bonds in some manner, which was not explained, found their way to England, and were there received by the prisoner, who was charged with receiving them, knowing them to be stolen property. He could not be convicted, unless it was shown that the thief, who was probably some Dutchman who had come on board, could have been convicted by English law for the theft. It was

[1] *Marshall* v. *Murgatroyd*, L.R., 6 Q.B. 31.
[2] L.R., 1. C.C. 161. [3] 10 Q.B.D. 76.

held that if such a Dutchman had been carried away before he left the ship, he could have been convicted at the Central Criminal Court. The ship was still English territory, though moored to the Dutch shore. Therefore English law, as exercised through the Admiralty jurisdiction, reigned on board it, and attached to every one who entered it, and who, by placing himself under the protection of English law, became amenable to its jurisdiction and liable to its punishment.

§ 52. **British Ship.**—The mere fact that the ship has a certificate of registry as a British ship is *primâ facie* evidence that she is such. But the presumption may be rebutted, as, for instance, by showing that her owner was an alien.[1] On the other hand, a ship may be shown by evidence to be a British ship, though she is not registered as such.[2] If, however, a ship appears to have had a foreign title, every step which is necessary to establish a lawful transfer to British ownership must be clearly made out. This was the ground of the decision in *Reg.* v. *Serva*.[3] There an English cruiser captured a slaver and put a prize crew on board. The prisoners rose on the crew and killed them. They were tried for murder in England. They were acquitted on the ground that under the treaties which were relied on to justify the capture, the slaver was not lawfully in British possession. There was, therefore, no territorial jurisdiction over the ship, and the prisoners, as foreigners, were in no other respect subject to British law.

§ 53. Where a foreigner is confined on a British ship, under circumstances which would justify him in using violence to effect his escape, he is not punishable for acts done with that object, even though they would otherwise amount to murder. But in respect of acts not done for that purpose, he is liable under British law exactly as if he were voluntarily on board. The former point was raised, but not decided in the case of *Reg.* v. *Serva*. The latter point was decided expressly, and the former inferentially, in the two following cases. In *Reg. v. Sattler*,[4] the facts of which have been already stated (*ante*, § 43), the prisoner, who was in irons on board an English steamer, shot the officer who arrested him, who afterwards died of his wound. Lord

[1] *Reg.* v. *Bjornson*, 34 L.J. M.C. 180.
[2] *Reg.* v. *Sven Seberg*, L.R., 1 C.C. 264.
2 C. & K. 53, 1 Den. C.C. 104.
B. 539; 27 L.J. M.C. 50.

a prisoner of war, who
sentinel in trying to es the argument of the case, said, "If
In giving the judgm had not given his parol, killed a
among whom the head cape, it would not be murder."
said: "Here a crime i ent of the full court (fourteen judges,
an English ship on th of the three courts were present), he
murder if the killing committed by the prisoner on board
English country; and e high seas, which would have been
circumstances, whether had been by an Englishman in an
subsequent detention, we are of opinion that under those
was guilty of murder the capture at Hamburgh, and the
England; for he was were lawful or unlawful, the prisoner
tory of England, entit and of an offence against the laws of
law, and he owed obed in an English ship, part of the terri-
the crime of murder— ed to the protection of the English
with the view of obta ience to that law; and he committed
and malice prepense." that is to say, he shot the officer, not
In the case of *Atto* ining his liberation, but from revenge
A-Sing, the prisoner w
who, while on a voya *ney-General for Hong-Kong* v. *Kwok-*
emigrant ship, killed as one of a number of Chinese coolies
and took the ship back e from China to Peru in a French
Hong Kong released th he captain and several of the crew
ground, *inter alia*, that th to China. The Chief Justice of
the coolies were justified e prisoner on *habeas corpus* on the
the purpose of obtaining e ship was a slave ship, and that
reversed on appeal by the n killing the captain and crew for
ships said: "There was e their liberty. This finding was
inferred that some of the Judicial Committee. Their Lord-
on the part of other Chi vidence from which it might be
barracoon and embark on coolies had, by fraud or by threats
They appear, however, all to h been induced to go to the
guese authorities at Macao that t the ship against their will
and there was, in their Lordsh professed to the Portu-
evidence upon the depositions th attac were willing emigrants
authorities at Macao, or the Frenc pann opinion, no sufficien
any parties to compelling any of the and either the Portugues
against their will." arg captain or crew, wer
The Committee were accordingly er oolies to leave Chin
offences committed by the prisoner, ass the
to be true, were those of murder under th on opinion that th
law, and piracy *jure gentium*.[2] ing the evidenc
French municip

[1] D. & B. 547. [2] L.R., 5 P.C.
.B.D.
180, 199.

§ 54. It will be observed that it was the fact that the murder was committed in such a manner as to amount to piracy *jure gentium* which gave the English court jurisdiction. Otherwise it would have had none. An American, on board an American vessel, inflicted injuries on a German, who died from them after the arrival of the ship in Liverpool, where the American was taken into custody. It was held that there was no jurisdiction to try the offence in England, even under 9 Geo. IV., c. 31, s. 8, which gave the courts power to try a prisoner for murder, where the death ensued within its limits from an injury inflicted beyond them.[1]

§ 55. The rule that a merchant ship on the high seas is floating territory of its own nation, is qualified when it enters any foreign river or harbour which is completely a part of that foreign territory. In such a case, while the national jurisdiction remains, the territorial jurisdiction attaches to the ship and all on board of it, exactly as it would to a merchant or seaman who landed for trade or any other purpose.[2] Accordingly, in *Cunningham's* case,[3] Americans on board an American ship in the Bristol Channel were convicted of wounding one of the crew of the vessel, and this offence was tried in Glamorganshire, as having been committed in the body of the county (see *ante*, § 48). The French jurisprudence, however, recognizes a distinction between offences committed on the ship, which only affect its internal discipline or the persons on board, and offences committed by a stranger on one of the crew, or *vice versâ*, in such a manner as to disturb the peace and good order of the port. As to the former, they decline jurisdiction, either taking no notice of the matter, or handing over the offender to his own consul. In the latter case they deal with the offender themselves. Where their own merchant vessels are in a foreign port they recognize the jurisdiction of its tribunals, while authorizing their consular authorities to deal with the case, if the matter is not taken out of their hands.[4]

§ 56. Even in England the courts will not necessarily enforce statutory obligations upon foreign ships. It will be

[1] *Reg.* v. *Lewis*, 20 L.J. M.C. 164; D. & B. 182, *ante*, § 45.

[2] *Per* Marshall, C.J., *United States, the Schooner Exchange* v. *McFaddon*, 7 Cranch, p. 144; *per* Bovill, C.J., *Reg.* v. *Anderson*, L.R., 1 C.C., p. 165.

[3] Bell, C.C. 72, 28 L.J. M.C. 50.

[4] 1 Phill. Int. L., 374—376, *per* Bovill, C.J., L.R., 1 C.C. 163.

a question upon the construction of each statute, whether it was intended that the duties and penalties created by it should attach to foreigners, even within territorial waters.[1]

§ 57. **Territorial Waters.**—Although, as has been already stated (*ante*, § 48), no English county, and therefore no Indian district, extends on the seashore beyond low-water mark, a usage has sprung up in modern times of attributing for some purposes a quasi-territorial jurisdiction to every nation over the waters bordering on its coast, to a distance which is now generally spoken of as extending to a cannon shot, or one maritime league from the shore. A well-known international recognition of this doctrine is the rule, which prohibits acts of hostility to be carried on by one belligerent against another within three miles from a neutral shore, and which requires that prizes captured within that distance should be given up.[2] The origin, extent, and application of this marine jurisdiction were discussed exhaustively, especially by Cockburn, C.J., in the great case of *Reg.* v. *Keyn*.[3] There the *Franconia*, a German vessel, ran down the *Strathclyde*, an English ship, within three miles of the English shore off Dover, and thereby caused the death of an Englishwoman on the *Strathclyde*, under circumstances which, according to English law, amounted to manslaughter. The captain of the *Franconia*, a German, was tried for the offence under the Admiralty jurisdiction in the Central Criminal Court, and was convicted by the jury, the question of jurisdiction being reserved. The case was twice argued; on the second time before fourteen judges, of whom eight held that the conviction was bad, and six that it was good. The minority considered that within three miles from shore the sea was actually English territory, over which the Admiralty jurisdiction extended to foreigners as well as British subjects. The majority held that the comity of nations recognized certain undefined rights over such portion of the sea. That those rights did not amount to absolute ownership, so as to give the courts of the country jurisdiction, *de jure et de facto*, over foreigners for breaches of English law, but that they did authorize legislation which might create such a jurisdiction, if Parliament thought fit. The result of this decision was the pass-

[1] The *Eclipse*, 31 L.J. Adm. 201; S.C. 15 Moo. P.C. 268; the *Leda*, Swabey, Adm. 40; *General Iron Screw Collier Co.* v. *Schurmans*, 1 J. & H. 180; S.C. 29 L.J. Ch. 879.

[2] The *Twee Gebroeders*, 3 C. Rob. 162.

[3] 2 Ex. D. 63.

ing of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73).

It provides by s. 2, that "an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board, or by means of, a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

Proceedings in India for the trial of any person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the admiral, shall not be instituted in India except with the leave of the Governor-General or Governor of any presidency, and on his certificate that it is expedient that such proceedings should be instituted (s. 3).

The jurisdiction of the admiral in the above sections includes all Admiralty jurisdiction described as such in any Act of Parliament referring to India. And for the purpose of arresting a person charged with an offence triable under this Act, the territorial waters adjacent to any part of India are to be deemed within the jurisdiction of any judge, magistrate, or other officer who is authorized to issue warrants for arresting, or to arrest persons charged with committing offences within his jurisdiction (s. 7).

For the purposes of this Act, the open sea within the territorial waters of Her Majesty's dominions is to include any part of the open sea within one marine league of the coast measured from low-water mark. But the offences triable by virtue of this Act are limited to acts, neglects, or defaults such as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force (s. 7).

§ 58. **Foreign Ships of War.**—Ships which are the public property of the State, whether they are intended for war or for peaceful purposes, such as mail steamers, stand on a different footing from merchant ships when they enter a foreign jurisdiction. By international usage, and in deference to the sovereign by whom they are commissioned, they retain their territorial character even in the harbour of another State, and remain as much exempt from local jurisdiction as when they were on the high seas. This exemption does not arise from any predominant right in the sovereign

to whom the ship belongs, but from a concession made by the sovereign whose dominions are visited. The concession is implied from the permission to enter the port, and may for sufficient cause be recalled or refused by anticipation.[1] The immunity extends not only to the ship itself, but to its officers and crew and all persons who have entered the domestic waters under its protection, and to its boats, tenders, and other appurtenances. It does not extend to offences committed on shore, though the commander of any such vessel is entitled to be informed of the cause for which any person under his authority has been arrested.[2]

The commission of a foreign ship of war is sufficient to establish its character, and cannot be questioned. A French schooner, commissioned as a ship of war by the Emperor Napoleon, entered an American port, where it was claimed by an American citizen. He contended that it had been his property, that it was wrongfully seized by the French for alleged breach of neutrality, and that it had never been lawfully condemned. It was held by Marshall, C.J., that no court could look beyond the commission, and that the evidence offered was inadmissible.[3]

§ 59. How far this exemption extends to persons other than those who accompanied the ship on its arrival in port rests rather on reasoning than on decision. If persons subject to the home jurisdiction went on board the vessel, and there committed a crime, it would certainly be the duty of the commander to surrender them, and if he did so, the power to punish them would not be affected by the locality of the offence.[4] In the United States it is considered that a writ of *habeas corpus* might be lawfully awarded to bring up a subject illegally detained on board a foreign ship of war in American waters. Sir Robert Phillimore thinks that the same doctrine would probably be held by the courts of Great Britain.[5] Sir James Stephen discusses the right of fugitive criminals to seek asylum on board a ship of war, and decides against it, in conformity with the opinion of the French jurist, M. Ortolan.[6] This is in accordance with

[1] The *Exchange* v. *McFaddon*, Cranch 116; The *Parlement Belge*, 5 P.D. 197.

[2] 1 Phill. Int. L. 369.

[3] The *Exchange* v. *McFaddon*, 7 Cranch. 116, followed by Story, J., *Santissima Trinidad*, 7 Wheaton, p. 335.

[4] 2 Steph. Crim. L. 48—52.

[5] 1 Phill. Int. L. 372.

[6] 2 Steph. Crim. L., pp. 52—54.

international law as regards the analogous case of an ambassador's residence. Attempts to afford such an asylum to subjects accused of high treason, who sought a refuge in the residence of the English Ambassador, were forcibly resisted by Spain in 1726, and by Sweden in 1747, and in each case the remonstrances of Great Britain were rejected, and, in Sir Robert Phillimore's opinion, rightly.[1]

§ 60. The practice of Great Britain in allowing fugitive slaves to seek refuge on her ships of war is stated in two circulars of the year 1875.[2] They came substantially to this, that ships lying in foreign waters should not admit fugitive slaves unless their lives were in danger, or harbour them longer than such danger continued, except in places where slavery was by treaty with Great Britain rendered illegal. These circulars caused considerable outcry, which led to the appointment, in 1876, of a Royal Commission to investigate the subject. The reports of the Commissioners conceded that there was no legal right to receive a slave, merely because he wished to escape from slavery, and to protect him against the rights of a master legally existing at the place from which he escaped. On the other hand they recognized a right higher than technical law to afford such protection in special cases where it was demanded in the interests of humanity.[3]

§ 61. III. **Piracy jure gentium** is an offence against all nations, which renders the offender punishable by his captors, wherever he may be found, to whatever nationality he may belong, and in whatever court having jurisdiction to try such offences he may be arraigned.[4] In the case of *Attorney-General of Hong-Kong* v. *Kwok-A-Sing*,[5] the Judicial Committee cited with approval the following definition of the offence given by Sir Charles Hedges in *Rex* v. *Dawson*:[6] "Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, tackle, apparel, or furniture, with a felonious intention, in any place where the admiral hath or pretends to have jurisdiction, this is also robbery and piracy."

[1] 2 Phill. Int. L. 212.
[2] Annual Register of 1875, pp. 224—226.
[3] 2 Steph. Crim. L., pp. 43—58; Ann. Register, 1876 [91].
[4] 1 Phill. Int. L. 379.
[5] L.R., 5 P.C., p. 199, *ante*, § 53.
[6] 13 State Trials, 454.

In the case of the *Magellan Pirates*, Dr. Lushington said: "If it was clearly proved against the accused that they had committed robbery and murder upon the high seas, they were adjudged to be pirates, and suffered accordingly. It was never deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts such as robbery and murder on the high seas are piratical acts and contrary to the law of nations."[1]

§ 62. These extracts, though perfectly adequate in reference to the cases to which they were applied, are not definitions, in the logical sense, of the term *piracy jure gentium*. They are at once too wide and too narrow. For instance, it has been repeatedly held by the most eminent judges in the United States that, "the mere committal of robbery or murder by a person on board of or belonging to a vessel, which at the time, in point of fact as well as of right, is the property of the subjects of a foreign state, who have at the time, in virtue of this property, the control of the vessel, is not piracy *jure gentium*." It may be punishable as such by the nation which has jurisdiction over the ship, but not by other nations.[2] Where such acts are done by those who are on board the vessel, they will become piracy *jure gentium*, if by overpowering the master they obtain possession of the vessel or its contents; and it makes no difference whether the offenders are the crew or the passengers, or what the purpose may be for which they intend to use the ship, provided they are not acting *bonâ fide* under any justifying authority, or for any justifiable cause. In the case of *United States* v. *Pirates*,[3] the crew of a properly commissioned vessel rose upon their officers and proceeded on a piratical cruise. Johnson, J., said, "The decision in Palmer's case does not apply to the case of a crew whose conduct is such as to set at nought the idea of their acting under allegiance to any known power. From which it follows, that when embarked in a piratical cruise

[1] 1 Phill. Int. L. 392.

[2] *Per* Marshall, C.J., *United States* v. *Klintock*, 5 Wheaton, 144, following a previous decision of his own; *United States* v. *Palmer*, 3 Wheaton, 610, p. 643.

[3] 5 Wheaton, 184.

every individual becomes equally punishable, whatever may have been his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked." So in *Reg.* v. *Ternan* or *Tivnan*,[1] the vessel was seized by passengers, who sent the master and crew adrift in a boat. Blackburn, J., said, "When the crime consists in having overpowered the ship, it becomes a crime under the jurisdiction of every civilized nation; but other cases of robbery on board a ship may be cases of piracy by the municipal law of a country, but not *de jure gentium*." In the case of *Attorney-General of Hong-Kong* v. *Kwok-A-Sing*,[2] the seizure of the ship by cooly emigrants was held to be piracy, though they intended to make no other use of the vessel than as a means of returning to their homes in China.

§ 63. Where a ship is actually cruising as a pirate, any attack by it upon another ship would be punishable as piracy, whether successful or the reverse. And there seems no reason to doubt that the mere act of cruising for piratical purposes, by a crew acting in defiance of all law and acknowledging obedience to no Government whatever, is also punishable as piracy *de jure gentium*.[3]

§ 64. No acts done by a ship regularly commissioned by a State, which is not itself a piratical State, and professing to act under that commission, can be treated as piracy, though the commander of the ship exceeds his commission.[4] A privateer has only authority against the enemies of the belligerent by whom he is commissioned, or against neutrals who violate the laws of neutrality; and any intentional attack by him upon friendly powers is piracy.[5] Where a civil war has reached that height in which the rebels are recognized as belligerents, though they have not been recognized as independent, the acts of war carried on by such rebels cannot be treated as piracy. This was so laid down by Marshall, C.J., in *United States* v. *Palmer* (*ante*, § 62), during the rebellion of the Spanish colonies in South America. In *Reg.* v. *Ternan* (*ante*, § 62), there was some reason to suppose that the persons who captured the American vessel were acting on behalf of the Confederates. Blackburn, J., said, "But looking at the evidence,

[1] 33 L.J. M.C. 201; S.C. 5 B. & S. 643. [2] L.R., 5 P.C. 180.
[3] *United States* v. *Klintock*, 5 Wheaton, 144; *United States* v. *Pirates*, 5 Wheaton, 184; 2 Steph. Crim. L. 28.
[4] 1 Phill. Int. L., pp. 392—394.
[5] *Per* Sir Leoline Jenkins, cited 1 Phill. Int. L. 383.

what was done by the prisoners is either taking the ship for plunder, which would be piracy *jure gentium*, or an act of war, and consequently not triable anywhere. For although the Confederate States are not recognized as an existing power, yet they are as belligerents."

§ 65. Offences which are constituted piracy by municipal law, even by Act of Parliament, can confer no jurisdiction over foreigners, and it makes no difference that they are committed within the three-mile limit.[1] Foreign vessels seized under such Acts, unless sanctioned by treaty, must be released, and those who resist seizure are not punishable criminally.[2]

§ 66. As pirates are triable by any power into whose hands they fall, the jurisdiction over them attaches upon capture to the nation by whom they were captured, and cannot be transferred to any other nation. In 1852 some Chinese emigrants rose upon the captain and crew of an American vessel, murdered them, and carried away the vessel. An American officer captured some of the offenders, and brought them to Hong Kong, where he desired that they should be tried by the Supreme Court. The point was referred to the Queen's advocate, Sir J. D. Harding, and to the Attorney and Solicitor-General, Sir Frederick Thesiger and Sir Fitzroy Kelly, who were unanimously of opinion "that no British authority could, consistently with the law of England, or with the law of nations, take cognizance of such a case as that described.[3] On the same principle, the English courts decided that an American who was charged with piracy committed on an American vessel, and who was in British custody, could not be surrendered under a treaty of extradition with the United States.[4]

§ 67. The Act 12 & 13 Vict., c. 96, now extended to India, gives jurisdiction over cases of piracy committed within Admiralty jurisdiction to any court which could have tried the case, "if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of such colony, and within the limits of the local jurisdiction of the

[1] *United States* v. *Kessler*, Bald. 15.

[2] The *Louis*, 2 Dodson, Adm.; *per* Sir W. Scott, p. 239; *Reg. v. Serva*, 2 C. & K. 53; S.C. 1 Den. C.C. 104.

[3] Forsyth, 229.

[4] [illegible] 22 L. J. M. C. 201; 5 B. & S. 643.

courts of criminal justice of such colony." In 1851 a question arose as to the power of the Commission Court of Honduras to try a case of piracy. It was referred to the law officers, Sir John Dodson, Queen's Advocate, and Sir John Romilly and Sir A. E. Cockburn, Attorney and Solicitor-General, and they reported against the jurisdiction. They stated as their opinion, "that the commission court, according to the stat. 59 Geo. III., c. 44, and the letters patent of the Crown by which it is constituted, has no jurisdiction to try *eo nomine* for piracy, and that the subsequent imperial statute of the 12 & 13 Vict., c. 96, which the Chief Justice of Honduras seems to think has given that jurisdiction to the court, only contemplated the trial by any colonial court of the same offences when committed on the high seas, which the same court might previously have tried if committed upon any inland waters."[1] From this opinion it would follow that piracy, as such, can only be tried in the High Courts of Bombay, Calcutta, and Madras. Over the robbery or murder which constitute the overt acts of the alleged piracy, the Mofussil courts would have jurisdiction, if the offender was amenable to the British courts for such offences. If, however, he was a foreigner, who could only be tried at all as a pirate *jure gentium*, then it would seem that he would have to be committed to the High Court.

§ 68. **Law applicable to each case.**—*Thirdly* (*ante*, § 29). We have to consider, as regards the trial in India of offences committed out of India, what law is to be applied to ascertain the offence and to determine the penalty.

As regards offences committed by servants of the Queen and by European British subjects within the allied Native States, and by native Indian subjects anywhere, the Penal Code applies.[2] The same rule would apply to all offences committed on board a ship which could properly be considered as being, at the time the offence was committed, within the limits of an Indian district. (See *ante*, § 48.) It will be observed that the stat. 12 & 13 Vict., c. 96, s. 1, and the Merchant Shipping Act, 1894, ss. 686, 687, all assume that the Indian courts would have jurisdiction, apart from those statutes, over offences committed on a ship which

[1] Forsyth, 227.

[2] P.C., s. 4; Act XXI. of 1869, s. 8; Crim. P.C., 1882, s. 188, *ante*, 30.

was lying in the inland waters of British India. Such jurisdiction would, of course, be exercised according to the law of the country in which the ship was found (*ante*, § 55). The only difficulty arises in regard to offences cognizable by virtue of the Admiralty jurisdiction extended by statute, or by the special provisions contained in the series of Merchant Shipping Acts. This question requires to be examined with some closeness, as a recent decision in Bombay[1] has cut the knot in a manner which seems to me more summary than satisfactory.

§ 69. **Crimes committed on High Sea.**—Offences triable under the Admiralty jurisdiction, whether it was exercised by means of commissions issued to the colonial or foreign possessions of the Crown, or by means of the courts in England, were dealt with according to the ordinary course of the common law of England. As fresh statutory offences were created, power was given to the admiral to try them. All the Consolidation Acts of 24 & 25 Vict. contain such a clause.[2]

When the Supreme Courts were created in India, each of them was by its charter authorized to try crimes committed upon the high seas, "according to the laws and customs of the Admiralty in that part of Great Britain called England."[3] Doubts which had arisen as to whether these charters gave Admiralty jurisdiction beyond the local limits of the Courts, were settled by 33 Geo. III., c. 52, s. 156, and 53 Geo. III., c. 155, s. 110, which declared that the courts had jurisdiction according to the laws and customs of the Admiralty of England over crimes committed upon any of the high seas. There can, of course, be no doubt that so long as the Supreme Courts continued, all Admiralty offences were determined according to the criminal law of England, as indeed all offences were.

§ 70. The Penal Code was passed in 1860, and thereupon it took the place of English criminal law in the presidency towns. In 1861, Act 24 & 25 Vict., c. 104, was passed for establishing High Courts in India. By s. 9 it is provided *inter alia* that the High Courts should possess all

[1] *Reg.* v. *Sheik Abdool Rahaman*, 14 Bom. 227.

[2] See as to accessories and abettors, c. 94, s. 9; as to larceny, c. 96, s. 115; malicious injuries to property, c. 97, s. 72; forgery, c. 98, s. 50; offences against the coin, c. 99, s. 36; offences against the person, c. 100, s. 68.

[3] Calcutta Charter, s. 27; Madras, s. 42; Bombay, s. 54.

such Admiralty jurisdiction as was possessed by the late Supreme Courts, save as by such Letters Patent was otherwise directed, and subject to the legislative authority of the Council of the Governor-General of India. The Letters Patent of 1862 contain two sections relating to criminal law. Section 29: "That all persons brought for trial before the said High Court, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV. of 1860, called the Indian Penal Code, shall be liable to punishment under the said Act and not otherwise." Section 32: "That the said High Court shall have and exercise all such criminal jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty." It will be observed that the section which refers to the Penal Code does not include the Admiralty Court, and that the section which governs the Admiralty Court does not refer to the Penal Code. Obviously because it was intended to act in Admiralty cases under English law as it did before. The Letters Patent of 1865, s. 33, simply continue the Admiralty jurisdiction as conferred by the Letters Patent of 1862.

§ 71. No doubt similar Admiralty jurisdiction was given the charters of many of the leading colonial courts. In 1849 it was considered desirable to confer this jurisdiction upon all the colonial courts, instead of exercising it by commissioners specially appointed for that purpose. This was effected by Act 12 & 13 Vict., c. 96, s. 1, and s. 2, extended to India by 23 & 24 Vict., c. 88 (*ante*, § 39), which provided for the mode in which offenders should be tried in the colonies, and for the application to their case of the same laws as would be applied to their case, if the offence had been committed and tried in England, any law, statute or usage, to the contrary notwithstanding. It may be suggested that s. 2 only refers to the pains, penalties, and forfeitures which are to result from conviction. This, however, is clearly not the true sense of the section. The preamble recites that Admiralty offences used to be tried in the colonies by commissioners under the Act 10 & 11 Will. III., c. 7, "According to the civil law and the method and rules of the Admiralty," and afterwards by commissioners under Act 46, Geo. III., c. 54, "According to the common course of the laws of this realm used for offences committed upon the land within this realm." It then

recites that it is expedient to provide for the trial in the colonies of persons charged with the commission of *such offences*, that is offences by English law. Then s. 1 provides that all *such offences* shall be tried in the colonies in the same way as if they had been committed in the colonial waters; and s. 2 provides that whatever the law of the colony may be, the punishment shall be the same as would be awarded if the trial had been in England. If therefore the facts charged constitute no offence punishable in England, or an offence of a different character, the law of England must be looked to, and not that of the colony. Of course it would have been much simpler to say that the substance of the offence must be dealt with according to the law of England, and the procedure for trying it according to the law of the colonies, but then simplicity is not the characteristic of English statutes. It will be observed that the same phraseology is used in s. 2 of the Penal Code, where the words must bear the same meaning as I have attributed to s. 2 of Act 12 & 13 Vict., c. 96.

§ 72. Then comes the series of enactments under the Merchant Shipping Code. Section 267 of the Act of 1854 (*ante*, § 40) contains a perfectly distinct provision that the offences referred to in it may be tried by all courts which have Admiralty jurisdiction, but that they are to be deemed offences of the same nature respectively, and punishable in the same way as if committed within the Admiralty of England. Section 21 of the Merchant Shipping Act of 1855, and s. 11 of the Act of 1867 contain no such provision, but each Act is to be read with the Act of 1854 of which it forms a part; and the former section makes special reference to the Act of 12 & 13 Vict., c. 96. These sections were re-enacted in the Merchant Shipping Act, 1894, as ss. 686 and 687. It may therefore fairly be assumed that clauses *in pari materiâ* were intended to be dealt with in the same way.

§ 73. If this is so, the whole current of legislation is reasonable and consistent. Every Englishman is subject to the laws of his own country. He is liable to become subject to the laws of any other country which he visits, for any offence committed within that country, but not otherwise. If, then, Parliament directs that an Englishman who commits an offence on the high seas, shall be tried for it in a colonial or Indian court at the other end of the world, one would expect that the court should try him for the offence which he committed at the time and place where he committed

it. But the offence which he committed at such a latitude and longitude at sea was an offence at English law, or none at all. Otherwise, this remarkable result would follow, that if a person committed an improper act at sea, its criminality would depend on the direction in which the ship's head was turned. Suppose an English passenger in the Red Sea uses slanderous language which, by English law, would neither be punishable, civilly nor criminally, but which is defamation under the Penal Code; or, suppose he obtains the property of another by a representation which would not be a false pretence under English law, but would be cheating by the Penal Code; if he was tried in the Central Criminal Court he must be acquitted. Could he be convicted in the High Court of Bombay? Can a man who has committed no offence at all on the 1st July in the Red sea, be convicted on the 1st August in Bombay, on the ground that, if he had done the same act a fortnight later in a different place, he would have been punishable under a code, to which he was not subject when he did the act which is complained of? It seems almost a *reductio ad absurdum*. In *Phillips* v. *Eyre*,[1] Cockburn, C.J., said: "It appears to us clear that where, by the law of another country, an act complained of is lawful, such an act, though it would have been wrongful by our law, if committed here, cannot be made the ground of an action in an English court." In the same case on appeal,[2] Willes, J., said: "In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would be actionable, if committed in England; secondly, the action must not have been justifiable by the law of the place where it was done." This ruling is *à fortiori* applicable to criminal liability.

§ 74. With the exception of the Bombay decision before referred to, the decisions in the Indian courts have been in conformity with the above views.

In *Reg.* v. *Thompson*,[3] the prisoner, a British subject, was charged under 1 Vict., c. 85, s. 2, with feloniously cutting and wounding E. Ned, on the British ship *Scindia*, on the high seas, within the Admiralty jurisdiction, with intent to disable him. The jury negatived the felonious intent, and found him guilty of unlawfully wounding,

[1] L.R., 4 Q. B., at p. 239. [2] L.R., 6 Q.B., at p. 28.
[3] 1 B.L.R. O. Cr. 1.

which was a misdemeanour. This they were authorized to do by 14 & 15 Vict., c. 19, s. 5. The court assumed jurisdiction under 18 & 19 Vict., c. 19, s. 21 (*ante*, § 40). Peacock, C.J., said: "The charge, then, has been preferred under English law, and it has been tried under the procedure of Indian law, and the punishment must be according to English law" (p. 11). Macpherson, J., said: "I am of opinion that the English law is the law by which the prisoner was triable, and upon that point I concur generally with the Chief Justice. There is no doubt that the English law was the law which originally applied to offences committed on the high seas on board British ships; and this was continued by the Merchant Shipping Act, 1854. The question is, whether by the Amendment Act of 1885, or by the 12 & 13 Vict., c. 96 (extended to this country by 23 & 24 Vict., c. 88), this state of things was changed, and the local law was substituted for the English. I think it was not. I do not think it can be said that in either Act there is anything which distinctly shows an intention to alter the law by which such cases are to be tried, except in matters of mere procedure. But I have no doubt that under these statutes, the local procedure is the procedure which is to be followed" (p. 14).

§ 75. In *Reg.* v. *Elmstone* and others,[1] Hariot and Marks, the master and carpenter of a British ship the *Aurora*, were indicted for wilfully destroying it by fire, on its voyage from Bombay to Liverpool, when it had proceeded about fifty miles on its way; and Elmstone and Whitwell, the brokers of the ship, were charged with instigating the offence. Westropp, C.J., in an elaborate judgment of the Full Court, decided that the Penal Code could not be applied, either to the criminals on board the ship, or to those in Bombay who instigated the commission of an offence on the high seas and more than three miles from the shore. He reviewed the series of statutes already referred to, and decided that they exhibited one uniform intention, that the English law should be the substantive law of decision in cases made cognizable by the local tribunals by virtue of those statutes. In *Thompson's* case, which he approved, the Merchant Shipping Act of 1867, s. 11, was not referred to, as it had not reached India at the date of that decision. He said of it: "There is no recital or evidence of any intention in the stat.

[1] 7 Bom. H.C. C.C. 89.

30 & 31 Vict., c. 124, s. 11 (*ante*, § 40), to depart from the well-marked policy of the principal and amending Acts, in prescribing the English law as the substantive law by which cases should be decided. The word 'determine' is not, in our opinion, of itself any sufficient indication of such an intention, contrary as it would be to the Merchant Shipping Code, which the principal and amending Acts form. Recollecting that the stat. 30 & 31 Vict., c. 124, s. 11, applies to all the colonies, as well as to India, we should not feel warranted in giving that phrase any such extensive effect as to substitute throughout Her Majesty's dominions other than the United Kingdom the local law of each colony or province for the law of England" (p. 128).

§ 76. In a very recent case[1] where a British seaman was tried for an offence committed on the high seas on a British ship, it was held that the offence must be treated as one against English law, though the procedure was to be that of the Criminal Procedure Code. This case followed a previous ruling of the same court,[2] where the same view had been tacitly assumed. Both these cases were subsequent to the stat. 37 & 38 Vict., c. 27 (*ante*, § 40).

§ 77. That statute formed the ground of decision in *Reg.* v. *Sheik Abdool Rahaman*,[3] which remains to be considered. There the defendant, a native Indian subject, captain of a native boat, took on board at Aleppy, on the Malabar coast, a cargo for delivery at Bombay. He fraudulently sold it, and scuttled his ship near Goa. Both offences probably, and the latter certainly, were committed beyond three miles from the shore of Goa. He was charged under ss. 407 and 437 of the Penal Code, and was tried and convicted in the Sessions Court of Ratnagiri. On appeal it was argued that the Sessions Court had no jurisdiction to try any offence within the territorial waters of Goa, and that both offences, being committed on the high seas, could only be tried according to English law. As to the first objection, the Court said that, if the facts supported it, the prisoner could still be tried in British India under the Treaty Act IV. of 1880. "Then comes the question, whether the courts of India have jurisdiction, and whether the Indian Penal Code applies to offences committed on the high seas The stat. 30 & 31 Vict., c. 124, s. 11, which applies to India,

[1] *Reg.* v. *Gunning*, 21 Cal. 782.
[2] *Reg.* v. *Barton*, 16 Cal. 238.
[3] 14 Bom. 227.

says that offences on the high seas must be 'tried and determined' as if committed on the high seas;[1] and 37 & 38 Vict., c. 27, says that the punishment must also be according to the local law. The question is argued with force and clearness by Mr. Starling in his work on Indian Criminal Law, pp. 13—29 (4th edit.). He points out that the rule in *Reg.* v. *Elmstone*, to the effect that English, not Indian, law is applicable to offences committed on the high seas, and tried in India, is altered by stat. 37 & 38 Vict., c. 27. All disability is now removed since the passing of the two Acts cited. The preliminary objection as to jurisdiction therefore fails" (p. 230).

§ 78. With the greatest respect for the learned judges who decided this case, I cannot understand why they felt any difficulty in disposing of it. The prisoner was a native Indian subject, and therefore by Act XXI. of 1879, s. 8, and by the Crim. P.C., 1882, s. 188, he was punishable under the Penal Code wherever his offence was committed (*ante*, § 30). The whole of the discussion above quoted was therefore *obiter dictum*. As such, however, it requires discussion. Now, it will be observed that the judges did not dispute the soundness of the ruling in *Reg.* v. *Thompson*, and *Reg.* v. *Elmstone*, that in trying offences in India against persons who were not native Indian subjects, under 12 & 13 Vict., c. 96, and the Merchant Shipping Code, the substance of the offence was to be dealt with under English law. The *dictum* was that these decisions had been overruled by 37 & 38 Vict., c. 27, s. 3 (*ante*, § 40). But that section has nothing to do with the trial of the case. It takes the matter up after conviction, that is, when the trial is over, and nothing remains but the sentence; then, if the offence committed upon the high seas, or elsewhere, was also an offence punishable under the local law, the sentence is to be the same as if it had been committed within the local limits. If the offence was not so punishable, the Court must inflict such a punishment, known to the local law, as most nearly resembles that to which the prisoner might have been sentenced in England. Nothing is said as to the converse case, already suggested, where the act charged as an offence committed at sea or elsewhere, was not an offence at all under English law, or was an offence of a different character from that which was called by the same

[1] *Sic*, but clearly a misprint.

name in the place of trial. In short, it seems to me that the statute has no other object than that of adopting the local machinery for punishment to the English definition of crime.[1]

§ 79. **Crimes committed in Indian Waters.**—Different considerations arise when the offence has been committed within three miles of the seashore. It was suggested by Holloway, J., in *Reg.* v. *Irvine*,[2] that the Penal Code operated to the distance of three miles under s. 1, which directs that it should extend throughout the whole of the territories vested in Her Majesty. This view was based on the principle loosely laid down in books on international law, that territorial jurisdiction extended so far. Since the discussion in *Reg.* v. *Keyn*,[3] a distinction must be drawn between territorial jurisdiction and jurisdiction over territory. Jurisdiction under a local statute does not operate three miles from shore on the ground that the territory of the State extends so far; but every State has, for its own protection, a right to pass laws for certain purposes which will be recognized by other nations, and of course acted on by its own tribunals.[4] Cockburn, C.J., says:[5] "Then how stands the matter as to usage? When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage, as to the application of the general law of the local State to foreigners on the littoral sea, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present."

§ 80. There is no doubt that the Legislatures of India or the colonies have, within the limits imposed upon them at their creation, the power to bind persons domiciled within

[1] *Reg.* v. *Gunning*, 21 Cal. 782.
[2] 1st Mad. Sess. 1867.
[3] 2 Ex. D. 63, *ante*, § 57.
[4] 2 Ex. D., pp. 90, 138, 208.
[5] *Ibid.*, p. 206.

their jurisdiction up to three miles, and even foreigners to the extent recognized by international law. In *Rolet* v. *The Queen*,[1] the Judicial Committee held that the customs ordinances of Sierra Leone bound foreigners on a foreign ship within the territorial waters. In 1854, Sir J. Harding, the Queen's advocate, advised that foreigners might lawfully be prevented from whale and seal fishing within three miles of the Falkland Islands. In 1855, the same officer, and Sir A. Cockburn and Sir R. Bethell, Attorney and Solicitor-General, advised similarly as to the validity of the legislation of British Antigua.[2] Where express legislation created, or applied to offences within the territorial waters, I suppose no reference to the Governor-General or Governor would be necessary under the Territorial Waters Jurisdiction Act (*ante*, § 57). It would certainly be necessary, if it was desired to punish a foreigner on a foreign ship for anything contrary to the Penal Code. If an Englishman in an English ship lay within these waters, he would be punishable for any offences committed on that ship under the Acts already discussed, and, in my opinion, could only be punished by English law. Suppose, for instance, that an English vessel on its way from Liverpool to Calcutta lay a mile off the shore at Bimlipatam to discharge cargo, and that a passenger on board then and there committed an act of adultery; I imagine it would hardly be contended that he could be tried for it in India. But it might be very different if the offender was a person who, being domiciled or resident in India, and thereby personally subject to the Penal Code, went from shore to the vessel, committed the act there, and then returned.

In *Reg.* v. *Kastya Rama*,[3] it was held that the removal of fishing stakes fixed in the sea within three miles of the shore was an offence under the Penal Code, ss. 425 and 427, and punishable in India under 12 and 13 Vict., c. 96. The decision was based on the view that the territories of India extended to three miles from the shore, and therefore that the Penal Code applied under ss. 1 and 2. This seems not to be well founded. The decision itself is probably maintainable on the ground that the defendant was subject to the Penal Code by domicil, and did not escape from it till beyond three miles from shore. At the date of the decision the Act XXI. of 1879 had not become law.

[1] L.R., 1 P.C. 198. [2] Forsyth, 24.
[3] 8 Bomb. H.C. CC. 67.

CHAPTER III.

GENERAL EXCEPTIONS.

§ 81. CHAPTER IV. of the Penal Code contains a series of provisions which must be read along with every subsequent portion of the Code, and which point out how acts, which in terms come within the definition of an offence, are either justifiable, or exempt from liability to punishment.

Sections 76 and 79 relate to the case of persons who are, or who justifiably believe that they are, acting in conformity with law. Where their acts are, on their face, legal, of course no further question can arise. But cases of considerable difficulty occur where persons act under superior, or even the highest authority, when the orders given to them are not in accordance with the usual working of the law. Such orders may be absolutely illegal, or they may be legalized by an emergency which sets aside the ordinary

procedure applicable to similar cases, or they may be done by virtue of a power which stands above the law, and is exempt from its jurisdiction. It will be advisable to preface my remarks on these three heads by some general observations on the constitutional relation between the Sovereign and the subject.

§ 82. The legal maxim that the king can do no wrong, does not mean that he can do anything he likes. It only means that every public act of his must be done upon the advice, or by the assistance of some one who is responsible for its legality. As Lord Hale says:[1] "It is regularly true that the law presumes the king will do no wrong, neither indeed can do any wrong; and therefore if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified; for though the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently renders the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." And this is in accordance with the twenty-ninth clause of Magna Charta, which declares "that no free man shall be taken, or imprisoned, or disseized of his property, or outlawed, or exiled, nor in any way hurt, nor shall the King forcibly enter or pass upon him, unless by the judgment of his peers or by the law of the land." Every subject therefore who is injured by an illegal act of the Executive, may sue or prosecute the person who commanded or actually did the act.[2]

§ 83. As the Sovereign cannot directly violate any legal right of the subject, so he cannot dispense with or suspend the operation of any statute. The exercise of such a right, rested on an obscure though undoubted prerogative of the Crown, was one of the causes of the downfall of James II. While the throne remained vacant the Houses of Parliament passed the Declaration of Rights, which was read out to the Prince and Princess of Orange on the 13th February, 1689, when the Crown was formally offered to them, and was accepted by them as defining the limits of their sovereignty. It commenced with the following clauses: 1. "That the pretended power of suspending of laws, or execution of laws, by legal authority, without consent of Parliament, is illegal.

[1] 1 Hale, P.C. 43.

[2] See, *per curiam*, *Rogers* v. *Rajendro Dutt*, 8 M.I.A., p. 130.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."[1] Nor can the Sovereign, or the Executive as representing the Sovereign, do indirectly what it cannot do directly. It cannot frustrate the operation of the law, by refusing that assistance, without which the law is helpless. This was decided in two very important cases, both arising out of occurrences in Ireland.

§ 84. In the earlier of these cases[2] the Irish Court of Exchequer had issued a writ in execution of a decree for tithes, obtained by a rector. The officer to whom it was entrusted, being unable to carry out his orders in consequence of the disturbed state of the country, applied for assistance to the District Inspector of Police, who again applied to the head of the Irish Police for direction. The latter refused assistance, in accordance with instructions issued under the Police Act by the Lord-Lieutenant, and applying to cases of tithes. Upon this the Court attached both the police officials for contempt of Court. The case came before the House of Lords, when the Common Law Judges were asked to give their opinions on questions submitted to them. Upon three of these questions they laid down the law as to the rights of officers of justice to call upon the public generally, and specially upon the police, for assistance in executing process, either in case of actual resistance, or of a reasonable apprehension of resistance. Upon the fourth question they replied: "That the order of the Lord-Lieutenant did not affect this obligation, as nothing in the Police Act was intended to diminish or abridge the common law duties of a constable, or take away any responsibility where it has attached by the common law. There is nothing in that order which can have the effect of absolving them, nor is any authority given by the statute to absolve them from the performance of such their common law duty." This decision was followed in Ireland in a very recent case[3] under exactly similar circumstances. The sheriff applied to the police for assistance to enable him to execute by night certain writs of *fi. fa.* for rent in a disturbed district. The police authorities refused to grant any assistance until daylight, by virtue of distinct orders to that

[1] Rapin, History of England, ii. 749, where the document and the assent to it are set out in full.

[2] *Miller* v. *Knox*, 4 Bing. N.C. 574.

[3] *Atty.-Gen.* v. *Kissane*, 32 Ir. L.R., C.L. 220.

effect issued by the chief officials in Dublin. It was proved that an attempt to execute such writs by day would be ineffectual. The Court decided that the refusal of the police authorities to render the assistance required was wholly illegal, that they could derive no protection from the official orders, and that, by refusing, they had committed an offence which was punishable by indictment, by criminal information, or by process of attachment for contempt of Court.

§ 85. The principle that an illegal order of the Executive is no protection to those who carry it out, against either an action or an indictment, is not always an effective remedy, especially as the higher public servants are not responsible for the acts of their subordinates, in the same way as an ordinary employer is for the acts of his servants. For instance, the head of a department who makes a contract is not personally liable for payment. It is understood that he contracts as agent for Government, and that payment will be made out of the public funds when, and if, they are supplied. If they are not supplied, he is not responsible.[1] So a public servant, such as the captain of a man-of-war or the Postmaster-General, is responsible for his own acts, but not for those of his subordinates, unless commanded or sanctioned by him, because he has not appointed them, and cannot displace them.[2] Nor can the head of a department be sued by any of his subordinates for his pay or pension, even though he has received the necessary funds, because there is no privity between them, and the head is responsible to the State for his application of the public money.[3] Hence where the only effective remedy is against the State, that remedy does not exist at common law, because the Sovereign cannot be sued in his own court, or indeed in any court. "Where the subject is entitled to a right which the Crown withholds, or has suffered a wrong which the Crown ought to redress, the remedy at common law or by Magna Charta is by petition of right."[4] The mode of obtaining this remedy is now regulated by 23 & 24 Vict., c. 34.

§ 86. Now in this respect the law of England differs from that of India. It was always held that the East India

[1] *Macbeath* v. *Haldemand*, 1 T.R. 172.
[2] *Nicholson* v. *Mouncey*, 15 East. 384; *Whitefield* v. *Lord Despencer*, 2 Cowp. 754.
[3] *Gidley* v. *Lord Palmerston*, 3 B. & B. 275.
[4] 6 M. & G. 253, note.

Company, though it exercised sovereign powers under the authority of the Crown, was not itself a sovereign, and was liable to be sued in respect of all matters in which it was not acting as a sovereign. The earliest decision on the subject was that of *Moodaly* v. *E. I. Co.*,[1] where the lessee of a tobacco monopoly sued the Company for assigning the right to another before the termination of his lease. Sir Thomas Sewell, M.R., said: "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think the E. I. Co. is within that rule. They have rights as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sum secured may be recovered here." When courts of justice were for the first time established in 1793, the preamble to Beng. Reg. III. of 1793 declared that the Government officers "shall be amenable to the courts for acts done in their official capacity in opposition to the regulations; and that Government itself, in superintending these various branches of the resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters to be decided by the courts of justice, according to the regulations, in the same manner as suits by individuals." From this time there can be no doubt that the E. I. Co. was always held liable to be sued in the Indian courts, in every case which was not excluded from the jurisdiction of all municipal courts.

§ 87. When the direct government of India was assumed by the Queen, in 1858, under stat. 21 & 22 Vict., c. 106, it was provided by s. 65 that "the Secretary of State in Council shall and may sue and be sued, as well in India as in England, by the name of the Secretary in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company." By this section and s. 68 all judgments and executions against him are to be enforced out of the revenues of India. The liability of the East India Company before 1858, and of the Secretary of State subsequently, was elaborately discussed by Sir B. Peacock, C.J., in the case of the *P. & O. Co.* v. *Secretary of State in Council*,[2] where the defendant

[1] 1 Bro. Ch. Ca. 469.

[2] 2 Bourke, 166.

was held to be liable for injuries caused by the negligence of workmen employed by Government in the Kidderpore dockyard. He pointed out that the liability of the Secretary of State was to be measured by that of the E. I. Co., and in that respect went beyond that which could have been urged against the Crown by a petition of right, since it was established that as the King cannot be guilty of personal negligence or misconduct, he cannot be responsible for negligence or misconduct of his servants.[1] "We are of opinion that for accidents like these, if caused by the negligence of servants employed by Government, the E. I. Co. would have been liable both before and after 3 & 4 Will. IV., c. 85, and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India."[2]

§ 88. In Calcutta the plaintiff, who had purchased at auction the right to sell liquors in a particular district, sued the Secretary of State on the ground that his right had been set aside by the Government officers, and transferred to another. It was held by the High Court that the Secretary of State could only be sued for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign power, and therefore that there was no jurisdiction over the defendant.[3] If this decision went upon the ground that the E. I. Co. would not have been liable in such a case, it is directly opposed to the decision in *Moodaly* v. *E. I. Co.*, cited before. If it went upon the ground that the liability of the Secretary of State is less than that of the E. I. Co., it is opposed to the judgment of Sir B. Peacock, C.J., which I have just quoted. The decision itself was doubted by Stuart, C.J., in *Kishen Chand* v. *Secretary of State*.[4] And the High Court of Madras refused to follow it in a case where the plaintiff complained of overcharges in the matter of salt duties.[5] It seems also opposed to a series of cases in the Privy Council, where the Secretary of State was sued without objection in respect of acts directly arising from the discharge of the

[1] *Ibid.*, p. 179, citing *Viscount Canterbury* v. *Atty.-Gen.*, 1 Phill. 327.
[2] *Ibid.*, p. 187.
[3] *Nobinchunder* v. *Secretary of State*, 1 Cal. 11.
[4] 3 All. 829, at p. 835.
[5] *Secretary of State* v. *Hari Bhanji*, 5 Mad. 272.

functions of a reigning sovereign. Several of these will be cited hereafter in treating of Acts of State (*post*, §§ 108–112). In none of them was it denied that the defendant was liable, unless he could make out that the proceeding complained of was an Act of State. In one of these cases, Sir L. Peel said, "If it turns out that the resumption was not an Act of State, the whole question is open, and the interpretation of the Code is matter for a civil court on remand."[1] In others no such question arose, and the case was merely argued on its merits, as between two private individuals.[2]

§ 89. An apparent exception to the general principle just discussed will be found in a series of statutes which restrained the action of the Supreme Courts as against the members of the Government, and persons acting under the written orders of the Governor-General in Council. To understand these acts it will be necessary to keep in mind the reason for their being passed. They originated in that singular contest between the Supreme Court of Bengal and the Government, which is detailed by Mill in his "History of India," iv. pp. 308–355; and in the more glowing pages of Macaulay in his Essay on Warren Hastings.

In 1773 the whole Constitution of the East India Company was placed on a new footing by stat. 13 Geo. III., c. 63, commonly known as the Regulating Act. Among other things it authorized His Majesty to grant a charter creating a Supreme Court. By ss. 15 & 17 it was provided that the Court should not be competent to try the Governor-General, or any of the Council for any offence, not being treason or felony; and that nothing in the Act should extend to subject the person of the Governor-General, or of any of the Council, or of any of the judges of the court, to be arrested or imprisoned upon any action, suit, or proceeding in the court. Similar provisions were inserted in the Charter, s. 34.

§ 90. Very shortly after the establishment of the Supreme Court, the judges began to claim jurisdiction over subjects and persons which were clearly beyond their control. They entertained suits against natives beyond their local limits, and broke open their houses and arrested them on mesne

[1] *Sirdar Bhagwan Singh* v. *Secretary of State*, 2 I.A. 38, at p. 40.

[2] *Secretary of State* v. *Anund-Moyidebi*, 8 I.A. 172; *Kali Krishna Tagore* v. *Secretary of State*, 15 I.A. 186; *Secretary of State* v. *Fahamid Unnissa Begam*, 17 I.A. 40.

process. They claimed an independent control over the collection of the revenue. They refused to recognize any authority in the mofussil courts. Finally they allowed writs to issue against the Governor-General and the members of his Council for orders given to resist an armed force, which the sheriff had marched against the Rajah of Cossijurah to sequester his land and effects. The result was a complete deadlock of the machinery of Government. Petitions flowed in upon Parliament. A commission of inquiry was appointed, and upon its report, stat. 21 Geo. III., c. 70, was passed. The ss. 1—4 are alone material to this subject.

By ss. 1 to 3, it was provided "that the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal, for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered or done by them in their public capacity only, and acting as Governor-General in Council." And "that if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court, for any act or acts done by the order of the said Governor-General in Council in writing, he or they may plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done, has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil and criminal, in the said court. Provided always, that with respect to such order or orders of the said Governor-General and Council as do or shall extend to any British subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this Act had never been passed."

Section 4. "Provided also that nothing herein contained shall extend to discharge or acquit the said Governor-General and Council, jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit, or process, before any competent court in this kingdom, or to give any other authority whatsoever to their acts, than acts of the same nature and description had, by the laws and statutes of the kingdom, before this Act was made." [1]

[1] See also 10 Geo. III., c. 47, s. 4.

§ 91. The statutes which authorized the charters of the Supreme Courts of Madras and Bombay, directed "that the Governor and Council at Madras and Bombay, and the Governor-General of Fort William, shall enjoy the same exemption and no other from the authority of the Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court of Judicature there already by law established."[1] The charters of the courts contained the same provisions exempting the Governor-General and the Governor and his Council from arrest, from actions against them for acts done in their public capacity, and from indictments for offences other than treason and felony, as have been already set out.[2] Neither the statutes nor the charters create any exemption in favour of persons acting under order of the Governor in Council of either presidency.[3]

It is evident that these provisions are only intended to secure the heads of Government in each Presidency from suits and indictments on account of their public conduct, which should be impeached, if at all, before the Queen's courts in England. With the single exception of the protection given to persons acting under a written authority from the Governor-General, no exemption can be claimed by their subordinates. Nor does anything in these statutes and charters diminish the full right to sue the East India Company itself.

§ 92. We have next to examine acts which are not done under the ordinary course of law, but which are legalized by an emergency which justifies the setting aside of the usual procedure. Such acts, when done by private individuals, are specially provided for in the sections relating to self-defence. The most important of those which are done under the orders of the Executive come under the heads of Riotous Assemblies and Martial Law.

Riotous Assemblies.—The summary suppression of riotous assemblies by armed force, and the use for that purpose of any amount of violence, extending even to the causing of death, are justifiable on grounds of State necessity, and can only be justified so far as that necessity exists. It may

[1] 39 & 40 Geo. III., c. 79, s. 2; 4 Geo. IV., c. 71, s. 7.

[2] Madras Charter, ss. 23 & 25, 2 M. Dig. 604, 617; Bombay Charter, ss. 30 & 45, 2 M. Dig. 654, 668.

[3] See *re Wallace*, 5 Mad. 24, where the whole series of these statutes and charters is reviewed by Turner, C.J.

seem anomalous that an Executive officer should be authorized, at his own discretion, to inflict capital punishment upon a rioter who could only, after due trial and conviction, be liable to three years' imprisonment. But experience has shown that a riotous assembly is the first step in the contest between violence and law, and that if it is not checked at once, all law is swept away, and every species of crime is certain to follow. So imperative is the necessity of immediately checking such riotous assemblies, that the law not only imposes this duty upon every authority entrusted with the preservation of the peace, and upon every private person who is summoned by him to assist, but also invests every military man, and even every private person with the same power, to be exercised under the same restrictions. Tindal, C.J., in his charge to the Grand Jury after the Bristol Riots of 1832, laid down the law as follows: "By the common law every private person may lawfully endeavour, by his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evildoers to keep the peace." He then pointed out, that though the co-operation of the civil authorities was desirable, it was not necessary, and should not be waited for if the occasion demanded immediate action. He then proceeded to say, "The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same."[1]

§ 93. During the colliers' strike in 1893, some men were shot

[1] *Reg.* v. *Pinney*, 5 C. & P., p. 262.

by the military during a riot at Featherstone. Lord Bowen, Sir Albert Rollit, and Mr. Haldane, Q.C., were appointed a commission to inquire into the circumstances of the riot, and to report upon the law which should govern the military in such a case. The report was issued on December 7, 1893. The great legal eminence of the president gives the report such an exceptional authority, that it may be useful to quote this, the latest statement of the law, upon a subject which may be of frequent occurrence in India.

§ 94. **The Law as to Firing.**—"We pass next to the consideration of the all-important question whether the conduct of the troops in firing on the crowd was justifiable; and it becomes essential, for the sake of clearness, to state succinctly what the law is which bears upon the subject. By the law of this country every one is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained.

"The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them. The riotous crowd at the Ackton Hall Colliery was one whose danger consisted in its manifest design, violently to set fire and do serious damage to the colliery property, and in pursuit of that object to assault those upon the colliery premises. It was a crowd accordingly which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property, justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

"Officers and soldiers are under no special privileges, and subject to no special responsibilities, as regards this principle of the law. A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself, if without necessity he takes human life. The duty of magistrates and peace officers to summon, or to abstain from summoning,

the assistance of the military depends in like manner on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life and limb, and in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour.

"The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance, or defines beforehand every contingency that may arise. One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. The military come, it may be, from a distance. They know nothing probably of the locality, or of the special circumstances. They find themselves introduced suddenly on a field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyze his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified by English law in standing by, and allowing felonious outrage to be committed, merely because of a magistrate's absence.

"The question whether, on any occasion, the moment has come for firing upon a mob of rioters depends, as we have said, on the necessities of the case. Such firing, to be lawful, must, in the case of a riot like the present, be necessary to stop or prevent such serious and violent crime as we have alluded to; and it must be conducted without recklessness or negligence. When the need is clear, the soldier's duty is to fire with all reasonable caution, so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An

order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favour of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists.

"With the above doctrines of English law the Riot Act does not interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony; and on this ground to afford a statutory justification for dispersing a felonious assemblage, even at the risk of taking life. In the case of the Ackton Hall Colliery, an hour had not elapsed after what is popularly called the reading of the Riot Act, before the military fired. No justification of their firing can therefore be rested on the provisions of the Riot Act itself, the further consideration of which may, indeed, be here dismissed from the case. But the fact that an hour had not expired since its reading, did not incapacitate the troops from acting when outrage had to be prevented. All their common law duty as citizens and soldiers remained in full force. The justification of Captain Barker and his men must stand or fall entirely by the common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?

"If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader who under such conditions is shot dead, dies by justifiable homicide. An innocent person killed under such conditions, where no negligence has occurred, dies by an accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger, and innocent of all imprudence. The reason is, that the soldier who fired has done nothing except what was his strict legal duty."

§ 95. It will be observed in the above extracts that the duties, rights, and liabilities of the officer and private soldier are placed on exactly the same level. The command of the officer cannot of itself justify the soldier in firing, if the

command was illegal.[1] This might lead to a conflict between the military duty of the soldier to obey his officer, and his civil duty only to obey an order which was legal. Practically the case is not likely to occur. It is improbable that an officer would give an order to fire, which was so outrageously wrong that a soldier ought, on the spur of the moment, to refuse to obey. On the other hand, where the order was such as he might reasonably think he was bound to carry out, it is probable that any prosecution would be against the officer and not against the soldier. In *Keighley* v. *Bell*,[2] Willes, J., said: "I believe that the better opinion is, that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders." This rule was adopted by the Law Commissioners in the clauses relating to Suppression of Riot, ss. 51 and 53 of the Draft Code of 1878. Sir James Stephen says:[3] "Probably it would be found that the order of a military superior would justify his inferiors in executing any orders, for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good reasons for ordering them to fire into a disorderly crowd, which to them might not appear to be at that moment engaged in acts of dangerous violence; but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street, when no disturbance of any kind was either in progress or apprehended." The same rule appears to apply generally to all cases where an inferior acts in cases of danger under the orders of his superior, which are not apparently illegal."[4]

§ 96. Chap. IX. of the Crim. P.C., 1882, authorizes a magistrate or officer in charge of a police station to disperse any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, and to summon any non-military person to help in dispersing the assembly and arresting its members.[5] If it cannot otherwise be dispersed, and if it is necessary for the public security that it should be dispersed, he may call in the aid of the military, who are to use no more violence than is necessary for the purposes required.[6] Any commissioned

[1] 1 East, P.C. 312; Foster, C.L. 154.
[2] 4 F. & F. 490.
[3] 2 Steph. Crim. L. 205.
[4] *Reg.* v. *Trainer*, 4 F. & F. 105, *post*, § 411.
[5] Sections 127, 128.
[6] Sections 129, 130.

officer of the army may take similar steps of his own accord when the public security is manifestly endangered, and when no magistrate can be communicated with.[1] By s. 132 it is provided that "No prosecution against any magistrate, military officer, police officer, soldier, or volunteer for any act purporting to be done under this chapter shall be instituted in any criminal court, except with the sanction of the Governor-General in Council; and no magistrate or police officer acting under this chapter in good faith, no officer acting under s. 131 in good faith, no person doing any act in good faith in compliance with a requisition under s. 128 or s. 130, and no inferior officer or soldier or volunteer, doing any act in obedience to any order which under military law he was bound to obey, shall be deemed to have thereby committed an offence."[2] The authority to the police to disperse unlawful assemblies given by s. 127 applies to the police in the towns of Calcutta and Bombay.[3] The repealed Act[4] extended to the police of Madras. It is difficult to see why the same powers are withheld from them now.

97. **Martial Law.**—Before discussing the legality of placing a country or district under martial law in cases of emergency, it is necessary to point out what is not meant by the term in this application of it. In the early law books the term is used as denoting what is now called military law, that is, the special law which governs those who, on becoming members of the military forces of the Crown, are thereby subjected to a special code of offences and procedure. The origin and growth of military law are traced by Cockburn, C.J., in his charge to the Grand Jury in *Reg.* v. *Nelson* (p. 86).[5] A similar body of law has grown up for the naval forces. The courts-martial, which try offences under this code of law, are so far subject to the superior courts of common law, that the latter courts will issue a prohibition to the former if they act without jurisdiction, as, for instance, by trying a person who is not subject to military law. But, where they have jurisdiction, no action or prosecution will lie which is founded on the assertion that they have passed an erroneous decision, or arrived at it by the admission of evidence which would be excluded in a court

[1] Section 131.
[2] Crim. P.C., s. 132.
[3] Crim. P.C., s. 127.
[4] XI. of 1874, s. 43.
[5] Published in 1867, as revised and annotated by the Chief Justice, and cited hereafter as Cockburn.

of common law.[1] Nor can a superior officer be sued at law for suspending his subordinate for a military offence and bringing him to trial before a court-martial, even though he is acquitted by it. If the superior officer has acted wrongly, this, again, is a military offence, which must be tried by military law.[2] But an officer can claim no exemption from a civil court in respect of an act wholly beyond military control. For instance, a soldier was held entitled to sue an officer for false imprisonment, where the punishment had been inflicted for disobedience to an order to attend evening school, and to make weekly payments towards its support.[3] Nor does the term apply to acts done by an armed force, in the summary suppression of a rebellion, against the persons and property of those who are actively engaged in the rebellion, so far as such acts are properly necessary for the purpose.[4] Cases of this sort come under the principles already discussed in regard to riotous assemblies. Martial law, for the purpose of the present discussion, may be defined in the language of the Duke of Wellington,[5] who said, "Martial law is neither more nor less than the will of the general who commands the army; in fact, martial law means no law at all. Therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out." The constitutional question is this: Can the Executive, at a period of emergency, suspend the ordinary law, and substitute, as regards its citizens, not being persons found in open resistance, a system called martial law, which renders them liable to be tried by new tribunals, a new procedure, and with new penalties, either for offences already recognized by law, or for conduct previously innocent, which the general declares to be criminal? That Parliament may authorize such a proceeding is beyond all doubt. In the Jamaica cases (*post*, § 104), Sir James Stephen doubted whether such an authority could be legalized by a Colonial Legislature, but the charges of both the Chief Justice and Mr. Justice Blackburn assumed that it could be.[6]

[1] *Grant* v. *Gould*, 2 H. Bl. 69, p. 101.
[2] *Johnston* v. *Sutton*, 1 T.R. 510, p. 548; confirmed in H. L., 1 Bro. P.C. 100; see 4 Taunt., p. 74.
[3] *Warden* v. *Bailey*, 4 Taunt. 67, p. 88.
[4] Cockburn, pp. 25, 84; 1 Steph. Crim. L. 214.
[5] Cited by Mr. Headlam, Cockburn, p. 101.
[6] Cockburn, p. 75; Forsyth 561; *Reg.* v. *Eyre*; Finlason, p. 81.

§ 98. The legality of martial law, in the last-named sense, has never been the subject of judicial decision, and only became the subject of judicial discussion in consequence of the Jamaica disturbances of 1865. As a result of the action of the Executive on that occasion, the Jamaica Committee laid a case before Mr. Edward James and Mr. Fitzjames Stephen for their opinion. The case and opinion are printed in full in Forsyth's Constitutional Law, and the opinion is given less fully in 1 Stephen, Crim. L. 207. In the case of *Reg.* v. *Nelson*, two members of a court-martial which sentenced Mr. Gordon to death, were put on their trial for murder, and the Chief Justice of England delivered a charge to the Grand Jury in which the whole question was exhaustively discussed. Subsequently Governor Eyre was put on his trial on similar charges, and in that case Blackburn, J., delivered a charge to the Grand Jury, which has been published by Mr. Finlason. In both cases the Grand Jury threw out the bills. The joint opinion of Messrs. James and Stephen, which was the work of the latter, is in remarkable conformity with the charge of Cockburn, C.J., to whom, of course, it was unknown. From these sources, supplemented in some slight particulars, the following view of the question is drawn.

§ 99. Between the time of Richard II. and the Commonwealth, there appear to have been numerous proclamations and commissions which purported to authorize martial law in times of public disturbance and rebellion. These are examined by Cockburn, C.J., and he ends his review by stating that "So far as I have been able to discover, no such thing as martial law has ever been put in force in this country against civilians, for the purpose of putting down rebellion." It is quite certain that no attempt to put martial law in force has ever been made in England since the Restoration.[1]

§ 100. **Irish Rebellion.**—In Ireland, however, the facts were different. On the eve of the Irish Rebellion of 1798, lawlessness in Ulster had risen to a degree which the ordinary power of the Government were unable to control. In March, 1797, Lord Lake received instructions from the Castle, which not only directed him to disarm the disaffected and to disperse tumultuous assemblies, but also authorized him to take all measures "which a country depending upon

[1] Cockburn, 25—47.

military force alone for its protection would require." In fact he was empowered to enforce martial law, in its widest sense. Under this authority steps were taken, which admittedly were far in excess of anything that could be justified by ordinary law, and under which the most terrible excesses were committed by the troops and yeomanry.[1] After the outbreak of the rebellion in 1798, further orders were issued, by one of which, in April, the Commander-in-Chief was authorized "to hold courts-martial for the trial of offences of all descriptions, civil and military, with the power of confirming and carrying into execution the sentences of such courts-martial, and to issue proclamations."[2] In October, Wolfe Tone was captured on board the *Hoche*, one of a French squadron of ships which was defeated in attempting a descent on Ireland. He was tried by a court-martial in Dublin, and sentenced to be hanged. Curran at once applied to the Court of King's Bench for a *habeas corpus*, on the ground that the prisoner "had no commission under His Majesty, and therefore no court-martial could have cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the great criminal court of the land." The writ was immediately issued by Lord Kilwarden, C.J., but before action could be taken upon it Wolfe Tone had committed suicide.[3]

§ 101. In 1799 two Acts of the Irish Legislature were passed, by one of which the exercise of martial law was recognized and sanctioned, while the other indemnified those who had acted under the previous proclamations. In 1803, and again in 1833, statutes of the Imperial Parliament were passed authorizing the trial of offenders by martial law in the disturbed districts of Ireland. These Acts, and especially the Indemnity Act of 1799, showed that the Government was not content to rely on the prerogative for their justification. On the other hand, each of these statutes, either by recital or reservation, contained an express assertion of the undoubted prerogative of the Crown to exercise martial law for the suppression of treason and rebellion. The Chief Justice considers that these recitals and reservations were absolutely inoperative, so far as they went beyond the common law of the kingdom.[4] Sir James

[1] Lecky, Hist. of England, vii. 285, 294, 299—310; Ann. Reg. of 1797, 260—264.
[2] Ann. Reg. of 1798, 213, 230.
[3] 27 St. Tri. 613.
[4] Cockburn, 53—57, 70—74.

Stephen thinks that the statutes "mean only that the Crown has an undoubted prerogative to attack an army of rebels by regular forces under military law, conducting themselves as armies in the field usually do."[1] Both judges are agreed, that no royal proclamation can authorize any act which is not reasonably necessary for the suppression of persons in open resistance to the Crown. They have no doubt that the trial of Wolfe Tone by a court-martial sitting within a mile of the Court of King's Bench in Dublin, was a mere nullity, and that his death, if he had been executed under the sentence, would have been murder. This too is in accordance with the opinions of Coke, Hale, and Comyns, in their various treatises. When the Petition of Right was being discussed, Lord Coke said: "A rebel may be slain in the rebellion; but, if he be taken, he cannot be put to death by martial law." And Rolle, afterwards Lord Chief Justice, and a most learned lawyer, on the same occasion said: "If a subject be taken in rebellion, and be not slain at the time of his rebellion, he is to be tried after by the common law."[2] In his application for a *habeas corpus* in Wolfe Tone's case, Curran asserted as a "sacred and immutable principle of the constitution, that martial law and civil law are incompatible, and that the former must cease with the existence of the latter." This is in accordance with Lord Coke and Lord Hale, who state that when the courts are open martial law cannot be executed.[3]

§ 102. **Ceylon Rebellion.** — In 1848 Lord Torrington, Governor of Ceylon, proclaimed martial law to suppress a rebellious rising in Kandy. The matter became the subject of Parliamentary inquiry by a Committee which sat in 1849, and evidence as to the nature and legality of martial law was taken, amongst others, from Sir David Dundas, then Judge-Advocate General. He said, very much to the same effect as the Duke of Wellington in the passage already quoted: "The proclamation of martial law is a notice to all those to whom the proclamation is addressed, that there is another measure of law, and another mode of proceeding than there was before." "Where martial law is proclaimed, there is no rule or law by which the officers executing it are bound." "It is more extensive than ordinary military law." "It overrides all other law, and is entirely arbitrary."

[1] 2 Steph. Crim. L. 211. [2] Cockburn, 37, 57—65.
[3] Cockburn, 69, note.

The Chief Justice quotes the answers merely to disagree with them. Sir James Stephen thinks that they only refer to the conduct of the army in the field, and are sound law.[1]

§ 103. In the course of these proceedings, Earl Grey, then Colonial Secretary, wrote a despatch, which he stated had been read out in Cabinet Council in presence of Lords Cottenham and Campbell, and had been approved by them. It contained the following passage, which seems to me not on the whole to go beyond what the Chief Justice and Sir James Stephen admit to be justifiable. There is certainly nothing in it which could be relied upon in support of the court-martial upon Wolfe Tone in Ireland, or upon Gordon in Jamaica.

"The proclamation of martial law is in fact no more than a declaration that, under circumstances of urgent public danger, the law is for a time suspended, and that for the safety of the State, the Government deems it necessary to set aside the ordinary rules of law by military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it: courts-martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions by instituting an inquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But courts-martial so assembled have nothing in common with the tribunals bearing the same name which, under the Mutiny Act, take cognizance of military offences. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with courts-martial assembled for the punishment of rebels, under proclamation of martial law, without the sanction of any positive enactment. Sentences of such courts add nothing to the legality of the punishments inflicted, and serve only to show that these punishments have not been inflicted without due regard to the guilt of those who were subjected to them. Accordingly, it is the practice where martial law has been used, and punishments have been inflicted under it, that when the danger is over the Legislature should be applied to for laws of indemnity, for the security of those by whom these powers have been exercised,

[1] Cockburn, 102; 1 Steph. Crim. L. 214.

and for whom there is no legal warrant, however necessary it may have been to assume them."[1]

§ 104. **Jamaica Riots.**—In the Jamaica case the only charge against Colonel Nelson and Lieut. Brand, and the principal charge against Governor Eyre, arose out of the treatment of Mr. Gordon. A negro outbreak took place at Morant Bay on October 11, 1865, in which the volunteers were overpowered, the court house was stormed, eighteen persons were killed, and upwards of thirty wounded, and an insurrection took place which rapidly spread to the neighbouring estates, where similar acts of murderous violence were committed. There was, no doubt, for a time a most dangerous crisis. The troops were, however, called out at once, and as soon as they appeared in the field the insurrection collapsed. Martial law was proclaimed on the 13th October. On the 17th, Mr. Gordon, against whom warrants had been issued, gave himself up to the authorities in Kingston. He could have been tried there by ordinary law, but by orders of the Governor he was put on board a war steamer, conveyed to Morant Bay, and there tried for treason by a court-martial, convicted, and sentenced to be hung. The sentence was ratified by the Governor, and on the 23rd Gordon was executed. It was asserted on behalf of the accused that all they did was literally justified by various Jamaica statutes. In the case of *Reg.* v. *Nelson*, the Chief Justice threw some doubt upon the application of those statutes, and suggested to the Grand Jury that they should leave this point for full discussion in the subsequent stage of the case. They, however, threw out the bill. In the subsequent charge against Governor Eyre, the judges of the Queen's Bench met to discuss the charge which Blackburn, J., was to deliver to the Grand Jury; and it seems to have been admitted that the statutes might authorize the proceedings taken. In his charge, the judge directed the jury that the Colonial Acts gave the defendant power to proclaim martial law, in the sense that it superseded the common law for the time being, and enabled all matters to be tried by summary procedure, not with an arbitrary discretion, but without applying mere technical rules; the question left to them was, whether the emergency warranted the Governor in applying, or in thinking that he was bound to apply this law.[2] This bill

[1] Finlason, "Review of Authorities as to Suppression of Riot or Rebellion," p. 96: 1868.

[2] Finlason, p. 81.

also the Grand Jury threw out. In his charge, however, Blackburn, J., through a misapprehension of what had been agreed on at the meeting of the judges, stated some propositions of law as having been approved of by them, which had not been so approved. On June 8, 1868, Cockburn, C.J., stated what had already been agreed on in the following language, which of course only applies to a case where there is an existing authority to proclaim martial law.

§ 105. "There was undoubtedly a proposition of law which seemed to us sufficient for the guidance of the jury, on which we were all agreed, viz. that assuming the Governor of a colony had, by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affects his responsibility in a court of criminal law, was that in judging of the necessity which, it is admitted on all hands, forms the sole justification for resorting to martial law, either for putting this exceptional law in force, or prolonging its duration, he should not only act with an honest intention to discharge a public duty, but should bring to the consideration of the course to be pursued, the careful, conscientious, and considerate judgment which may reasonably be expected from one invested with authority, and which, in our opinion, a Governor so circumstanced is bound to exercise, before he places the Queen's subjects committed to his government beyond the pale of protection of the law. Having done this, he would not be liable for error of judgment, and still less for excesses, or irregularities committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge.

"Furthermore, we consider that a Governor sworn to execute the laws of a colony, if advised by those competent to advise him, that those laws justify him in proclaiming martial law in the manner in which Governor Eyre understood it, cannot be held criminally responsible if the circumstances call for its exercise, and though it should afterwards turn out that the received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for a reckless, precipitate, and inconsiderate exercise of so formidable a power; still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the exercise of immoderate

severity in excess of what the exigencies of the occasion imperatively called for. Neither could the continuance of martial law be exercised, even as regards criminal responsibility, when the necessity which can alone justify it had ceased by the entire suppression of all insurrection, either for the purpose of punishing those who were suspected of having been concerned in it, or of striking terror into the minds of men for the time to come."[1]

In *Phillips* v. *Eyre*,[2] Willes, J., in delivering the judgment of the Exchequer Chamber, said with regard to the same facts: "Upon an indictment against a Governor for conduct alleged to be oppressive and criminal, circumstances and, above all, motives may be taken into account, which would be excluded in deciding dry questions of civil law."

§ 106. **Indian Mutiny.**—The course adopted by the Government of India during the Mutiny seems to have been in full accordance with the above principles. For a considerable time, and over a large extent of territory, all civil law was necessarily suspended by the act of the rebels. The civil officers were driven away, and the courts were closed. No authority other than the military was in existence, and it had to act summarily and on the spur of the moment as a matter of self-preservation. While the hostile forces were face to face, every one who appeared to belong to, or to be siding with the rebels, was dealt with as an enemy. When the pressure of war relaxed, discrimination and mercy could be shown; and as soon as British sway was restored, civilians were attached to the army for the purpose of dealing with those whose guilt admitted of a doubt. The State Offences Act, XI. of 1857, authorized the Executive to proclaim any district which was or had been in a state of rebellion, and to issue a commission for the trial of the rebels for any offence against the State, or for murder, arson, robbery, or any other heinous crime against person or property. The proceeding was to be summary and without appeal; but no punishment was to be passed except such as was warranted by law for the offence. As soon as peace was restored, and the courts were opened, justice resumed its ordinary course.

§ 107. The effect of an Indemnity Act in barring suits for illegalities committed under martial law was much considered in the case of *Phillips* v. *Eyre*.[3] There such an

[1] Finlason, p. 103.
[2] L.R., 6 Q.B., p. 15.
[3] L.R., 4 Q.B. 225, affd. L.R., 6 Q.B. 1.

Act, passed by the Jamaica Legislature, was successfully pleaded to a suit brought after the Act in the English courts. Cockburn, C.J., said:[1] "We may rest assured that no such enactment would receive the royal assent, unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments, that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will be incumbent on the defendant to make good those averments in order to support his plea."

In the case of *Wright* v. *Fitzgerald*,[2] a French master sued the Sheriff of Tipperary for acts of the greatest barbarity perpetrated during the rebellion of 1798, on the pretext—for which there does not seem to have been the least foundation—that he was a rebel. The defendant pleaded the Indemnity Act. Lord Yelverton, in his charge to the jury, said: "That as every man, whether magistrate or not, was authorized to suppress rebellion, and was to be justified by that law for his acts, it is required that he should not exceed the necessity which gave him that power, and that he should show in his justification that he had used every possible means to ascertain the guilt which he had punished; and, above all, no deviation from the common principles of humanity should appear in his conduct." Wright recovered five hundred pounds damages. Baron Martin said, in *Phillips* v. *Eyre*, on appeal, that this was the only case in which any one had obtained satisfaction for any act done in suppressing the rebellion.

§ 108. **Acts of State** differ from all the cases hitherto considered in this respect, that the assertion that an act is of this character does not raise a defence on the merits, but goes in bar of the jurisdiction. To make out this plea, it is necessary to show that the State, acting in its capacity as sovereign, not only dealt, but was justified in dealing with the matter in question, on principles paramount to the rules of municipal law, and therefore not to be controlled by municipal tribunals. It is within the jurisdiction of the

[1] L.R., 4 Q.B., p. 243.

[2] 27 St. Tri. 765.

Court to decide whether the proceeding complained of was an act of State or not. If it decides that it was, then its jurisdiction is at an end; if the contrary, then the case proceeds.[1] Every tribunal acts by virtue of an authority delegated to it by the State, for certain general purposes. It cannot exceed its authority, or apply it to different purposes. The Supreme Courts of the United States have a very large power to control the sovereign action, not only of the individual States, but of the entire body acting as one. Our courts are much more strictly limited.

§ 109. *First.*—The most obvious instances of acts of State are those which occur in the course of war, against an enemy, or quasi-enemy, or against persons who bring themselves within the operation of public law. No one, of course, would imagine that any claim could be made against the general of an invading army for injuries done to non-combatants, or for exactions levied upon them. When we bombarded the forts of Alexandria in 1882, the European States whose subjects were injuriously affected, made claims against England for compensation, the justice of which was acknowledged; but no one would have dreamed of indicting the admiral for murder. And it makes no difference whether the act has been originally ordered by the State, or has been subsequently approved by it. When the captain of a ship of war burnt some barracoons on the West Coast of Africa, and released the slaves contained, he acted on his own authority, but his conduct was approved by the Secretary of State. It was held that this adoption of his act made it an act of State, which barred a suit. The same ruling was followed in the Tanjore case.[2] So by international law the ships of neutrals are liable to be seized in war time, and brought before a court for condemnation. If condemned, the property in the ship is absolutely changed, but even if the seizure is declared to be illegal, and the ship is acquitted, no action founded on the seizure can be brought against the captors.[3] So if property in the possession of the Sovereign or of a private individual, is seized by the belligerent State, while hostilities are raging, or while the hostile condition continues, the transaction can give rise to no proceedings in

[1] *Musgrave* v. *Pulido*, 5 App. Ca. 102, p. 111.

[2] *Buron* v. *Denman*, 2 Exch. 167; *Kamachee Boye* v. *E. I. Co.*, 7 M.I.A. 476. See for a case where there had been no ratification, *Mir Zulef Ali* v. *Yeshvadabai*, 9 Bom. H.C. 314.

[3] *Le Caux* v. *Eden*, 2 Doug. 594; *Lindo* v. *Rodney*, *ibid.* 613.

a municipal court.[1] The same rule applies even where no hostilities take place, if the seizure is made by reason of the absolute power of the State, acting in its sovereign capacity. The Tanjore Raj was the survival of what had once been a powerful dynasty, which finally dwindled down into a petty, half independent principality, and so lingered on till the last Rajah died in 1855 without male heirs. It was then determined by the Government of India to put an end to the Raj, and to annex its territory. This was effected by the simple act of the Collector with a few British soldiers, and was unresisted because it was irresistible, though it was carried out against the will of all concerned. The Collector took possession of all property, public and private, of the late Rajah, though as to the latter it was announced that the Government did not intend to retain it, but would apply it for the benefit of the family. A bill was filed by the personal representatives of the late Rajah, in which they admitted that they could not dispute the seizure of the public property, but they claimed an account of the personal property. The Supreme Court decreed for the plaintiff, but this decree was reversed in the Privy Council. The Committee held that the whole annexation of Tanjore was an act of State, and that every part of the proceedings which was incidental and accessory to the completion of the annexation partook of the same character.[2]

§ 110. *Second.*—The same principle applies in the case of newly acquired territory, before its inhabitants have settled down into the regular legal relations of subject and sovereign. Where a country has been obtained by conquest or cession, it is usual to allow the inhabitants to retain their old laws and usages; but this is merely a matter of convenience, and the sovereign may deal with the rights of the conquered absolutely at his pleasure, except so far as he is restrained by the terms of the treaty, if any, by which the country was acquired.[3] If the laws are allowed to remain unchanged, it would, after a reasonable lapse of time, be assumed that the sovereign had accepted them as constituting the basis on which the government was to proceed, and any alteration of the rights constituted by these laws

[1] *Rajah of Coorg* v. *E. I. Co.*, 29 Beav. 300; 30 L.J. C[illegible]ro 226; *Elphinstone* v. *Bedreechund*, 1 Knapp. 316, p. 360.

[2] *Kamachee Boye* v. *E. I. Co.*, 7 M.I.A. 476. See pp. [illegible]on ', 536.

[3] *Per* Lord Mansfield, *Campbell* v. *Hall*, 1 Cowp., pp. [illegible]—210; *per* Lord Stowell, *Ruding* v. *Smith*, 2 Hagg. Cons., p. 380.

would have to be effected in a legal manner. But, during the transition, all proceedings taken by the Crown in settling the new country would be simply acts of State. They might be influenced, but they would not be governed by the existing laws. Two Indian cases went upon this principle. The plaintiff claimed relief against the conduct of the E. I. Co., in one case, after they assumed the sovereignty of the Carnatic by treaty with the Nabob; in the other, after their conquest of the Panjab. In each case the E. I. Co., while professing an intention to deal with titles to land, as they would have been dealt with by the Native Rulers, had assumed to themselves the disposal of all the land, and had disregarded the alleged rights of the claimant. In each case it was held by the Privy Council that the acts were acts of State, which were not intended to be, and could not be questioned by the municipal courts.[1] A contrary decision was given in the case of the Begum Sumroo. She had held lands as a sort of subordinate feudatory under Scindia till 1803. After that year the sovereignty of Scindia passed to the E. I. Co., and they accepted the position of Sumroo, and she held as of her old tenure till her death in 1836. On her death the Company resumed her lands on the alleged determination of her tenure. The courts in India dismissed the suit brought by her on the ground that the resumption was an act of State. This defence was overruled by the Judicial Committee. They said: "The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title, that title being the undoubted right of the sovereign power to resume and retain, or assess to the public revenue, all lands within its territories, upon the determination of the tenure under which they may have been exceptionally held rent-free. If, by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would, *primâ facie*, be cognizable by the municipal courts of India."[2]

[1] *Syed Ally* v. *E. I. Co.*, 7 M.I.A. 555; *Sirdar Bhagwan Singh* v. *Secretary of State for India*, 2 I.A. 38, p. 44.

[2] *Forester* v. *Secretary of State*, 12 B.L.R. (P.C.) 120, 150; S.C. 18 Suth. 349.

§ 111. *Third.*—A treaty is an act of State entered into between two sovereigns, which can only be enforced by diplomatic representations, or, in the last resort, by war. It is so completely outside municipal law, that one party may bind itself to hold property for the use of private persons, in a line of succession different from that which the ordinary law would permit.[1]

No suit can be brought by one party in the courts of the other for breach of its provisions.[2] Nor can any suit be brought by a private person, whose rights assume the continuance of the treaty, to enforce those rights against the other party, who has put an end to the treaty. In 1803 the E. I. Co. assigned lands to the King of Delhi for the support of the Mogul sovereignty. The King mortgaged them to the plaintiffs. After the Mutiny of 1857, the possessions of the King were seized and confiscated. The plaintiffs then sued the Government to establish their right as mortgagees. The courts in India dismissed the suit for want of jurisdiction. The Privy Council affirmed their decision. They held that the lands had been assigned to the Delhi kings by an arrangement which "was as much an act of State as if it had been carried into effect by formal treaty assigned by the British Government."

"Municipal courts have no jurisdiction to enforce engagements between sovereigns founded on treaties. The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations; nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property."

"The revenues and territories which in 1804 were, by an act of State, assigned for the maintenance of Shah Alum and his household, were, in 1857, also by an act of State, resumed and confiscated. The seizure and confiscation were acts of absolute power, and were not acts done under colour of any legal right, of which a municipal court could take cognizance."[3]

§ 112. *Fourth.*—Much more difficult questions arise

[1] *Nawab Sultan Mariam* v. *Nawab Sahib Mirsa*, 16 I.A. 175.

[2] *Nabob of Arcot* v. *E. I. Co.*, 4 Bro. Ch. Ca. 179.

[3] *Raja Saligram* v. *The Secretary of State*, Sup. Vol., I.A. 119; 12 B.L.R. (P.C.) 167, 184; S.C. 18 Suth. 389—392. See, too, *Doss* v. *Secretary of State*, L.R., 19 Eq. 509, a case arising out of the annexation of Oudh.

where a treaty operates in derogation of the previously existing rights of the subjects. In the case of *Damodhar Gordhan* v. *Deoram Kanji*,[1] by arrangement between the Government of India and a native Prince, an exchange of territories took place, by which part of a British district was, or was supposed to have been, transferred to the Prince. In the Privy Council the question whether such a transfer could be effected without an Act of Parliament was discussed with immense learning. The appeal was decided on another point. When Heligoland was ceded to Germany in 1890, the agreement for that purpose stipulated that the cession should be made "subject to the assent of the British Parliament," and an Act authorizing it was passed in the same year. In the House of Commons, however, it was contended that the treaty-making power of the Crown was amply sufficient for a cession, and that to effect it by Act of Parliament was unnecessary and unconstitutional. The balance of opinion seems to have been in favour of this view, though it was contended, on the other side, that where the cession was made in time of peace, for the purpose of carrying out some general scheme of policy, the consent of Parliament, if not necessary, was certainly desirable.[2]

§ 113. The same question lately arose, in a different form, in Newfoundland. By a series of agreements, dating from the Treaty of Utrecht, in 1713, the French have acquired rights of fishing along part of the coast of Newfoundland, which is known as the French shore. In recent years lobster-fishing has become a matter of importance, and the French contended that the inhabitants of Newfoundland had no right to erect factories on the French shore for the purpose of curing the lobsters. The dispute was temporarily settled by an international arrangement, known as a *modus vivendi*, which provided that no lobster factories which were not in operation on the 1st July, 1889, should be permitted on the French shore, unless by the consent of the commanders on each side. This agreement was not sanctioned by any Act of Parliament, or by the Legislature of the island. In pursuance of the agreement, Captain Walker, who was the English commander on the Newfoundland station, removed some lobster factories belonging to Mr. Baird. The latter sued him in the Colonial Court, and Captain Walker

[1] 3 I.A. 102.

[2] Ann. Reg., 170—173, 322: 1890; Times Debates, H.C. xvi. 398—408.

pleaded that the matters complained of were acts of State, arising out of the political relations between England and France, and involved the construction of treaties and of the *modus vivendi*, and of other acts of State, and could not be inquired into by the court. This plea was held to be no answer, and the decision of the Court of Newfoundland was affirmed in the Privy Council. Lord Herschell said:

"In their lordships' opinion the judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown, for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is quite untenable.

"The Attorney-General (Sir Richard Webster) admitted that he could not maintain the proposition, that the Crown could sanction an invasion by its officers of the rights of private individuals, whenever it was necessary, in order to compel obedience to the provisions of a treaty. He claimed, that as the Crown had power to make a treaty, it must possess the power to compel its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. If this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, and that an agreement which was arrived at to avert a war which was imminent, was akin to a treaty of peace, and subject to the same constitutional law.

"Whether these powers existed in either or all of these cases, and whether in both or either of these cases interference with private rights can be justified otherwise than by the Legislature, are grave questions upon which their lordships do not find it necessary to express an opinion. Their lordships agree with the court below in thinking, that the allegations contained in the statement of defence do not bring the case within the limits of the proposition, for which alone the appellant's counsel contended."[1]

§ 114. *Fifth.*—Sir James Stephen lays down the broad proposition that "as between the sovereign and his subjects there can be no such thing as an act of State."[2] The statement cannot be disputed so long as the relations between

[1] *Walker* v. *Baird* (1892), A.C. 491, at p. 496.
[2] 2 Steph. Crim. L. 65.

the sovereign and his subjects are in their normal condition; but I doubt whether it can be maintained when those relations have been voluntarily repudiated by rebellion, or have been suspended under the pressure of an overwhelming State necessity. An instance of the former class will be found in the well-known proceeding in Oudh. It was annexed on February 13, 1856, and thereupon all the inhabitants became British subjects. The Mutiny broke out in May, 1857. Some of the great landholders remained faithful to the E. I. Co., but the great mass of the population participated, actively or passively, in the rebellion. On March 15, 1858, Lord Canning issued his celebrated Proclamation, by which he confiscated all the land in the province of Oudh, except such as belonged to the faithful Taluqdars.[1] By various subsequent proceedings the land was re-granted, but it has been repeatedly held by the Privy Council that the Proclamation made *tabula rasa* of all the land tenures of Oudh, and that no title existed since that date which could not be traced back to some fresh grant by the Government of India.[2]

§ 115. Another question which, as far as I know, has never been considered judicially, is as to the rights of a State in time of invasion, not against the invaders or those who assist them, but against their own loyal subjects. There can be no doubt that any general would, for purposes of defence, set all private rights at defiance. He would requisition transport, supplies, and lodging for his troops. He would occupy all private houses which were suitable for defence, and would destroy all buildings and trees which interfered with the range of fire. In 1859 a Royal Commission was appointed to consider the defences of the United Kingdom. They addressed to Mr. Headlam, then Judge-Advocate-General, the following questions with regard to this subject:—

"1. Have you considered the effect of the proclamation of martial law in districts of England, and how far generals in command can be empowered to overrule and disregard all private interests and rights of property which come in the way of their operations?"

"3. Is there any authority now existing, under which martial law can be legally proclaimed?"

[1] The Proclamation will be found in 6 I.A., p. 74.

[2] *Rani of Chillaree* v. *Government of India*, 4 I.A., p. 210; *Nawab Malka Jehan* v. *Deputy Commissioner of Lucknow*, 6 I.A. 63.

His answers contained the following passages:—

"The effect of a proclamation of martial law in a district of England, is a notice to the inhabitants that the Executive Government has taken upon itself the responsibility of superseding the jurisdiction of all the ordinary tribunals, for the protection of life, person, and property, and has authorized the military authorities to do whatever they think expedient for the public safety. There is no doubt, therefore, that when a proclamation of martial law is issued, the Government, to use the language of the question submitted to me, empowers generals in command to overrule and disregard all private interests and rights of property which come in the way of their operations." "I consider it clear that during a period of great danger and necessity, the Crown is not only justified in proclaiming martial law, but that it would fail in the performance of its duty if, upon such an occasion, it were to shrink from the responsibility incident to such a step. The exercise, however, of this prerogative to proclaim martial law, seems to me to be a matter of contingent legality, rather than of absolute right; and the constitutional propriety of its exercise will have to be determined in each case by subsequent decision of Parliament, and the legality of the acts done under the authority of the proclamation will have to be established by Parliament in an Act of Indemnity to ministers, on whose responsibility the proclamation was issued." "Whenever Parliament is called on to give the sanction of law to the acts of those who have been concerned in putting in execution a proclamation of martial law, the question of granting compensation to those who have suffered in person or property, will naturally come under its consideration, and each case can then be dealt with in such manner as the Legislature may think fit."[1]

§ 116. These remarks by Mr. Headlam throw little light on the question which we are now discussing. Suppose an officer was sued or indicted for turning a mansion into a fort, in opposition to the resistance of an otherwise loyal owner, how should he defend himself? Should he plead that his proceedings were part of a great act of State, viz. a war against the invading nation, and that it was outside municipal jurisdiction? or should he plead that

[1] Report of Commission on Defence of United Kingdom, February 7, 1860, Appx., p. 90.

in acting under martial law he was doing what was justifiable by common law? Or, supposing an Act of Indemnity passed should he plead that his conduct, if ively legalized by Parliament? Practically, of course, his pleader would set up all these defences. It seems to me, however, that the first would be the real one. The war, suppose, with France, would be an undoubted act of State, and it is impossible to see how one of a consecutive series of acts could be separated from another. If it is an act of State to shoot an enemy, it must be equally an act of State to turn a house into a fortress for the purpose of shooting him. Of course this would not protect an officer who used his position for some purpose unconnected with war; as, for instance, if he carried away valuable pictures or statues which he found in the house. The court would have jurisdiction to find that such conduct did not come under the sanction of the State (*ante*, § 108). It is quite consistent with the whole tenor of English law to hold, that a person, acting for the best in a difficult position, should be freed from all fear of future litigation. Mr. Headlam seems rather to suggest that all such acts would be technically illegal, and would require a *post facto* justification. But if so, the act of the officer in the assumed case would be a felony, viz. housebreaking, and the owner would be justified in killing him; and if the owner was shot in the act of resistance, this would be murder. An Act of Indemnity would protect those who shot the owner, but it could not retrospectively render criminal any acts done by him in protecting his property.[1] This seems such an alarming conclusion that one is inclined to doubt the soundness of the basis on which it rests. It may, of course, be that the maxim *salus populi suprema lex* would be a sufficient defence in the case supposed, if it should be held fully cognizable by the ordinary tribunals. The spirit, though not perhaps the letter, of s. 81 of the I.P.C. would certainly cover such a case.

§ 117. **Foreign Government.**—The orders of a Foreign Government will only be a justification for acts done within its own jurisdiction. In *Dobree* v. *Napier*,[2] the defendant was sued for seizing an English ship. He pleaded that he commissioned as an admiral by the Queen of Portugal, and that he had been ordered by her to blockade

[1] See *per* Willes, J., L.R., 6 Q.B., at p. 25.
[2] 2 Bing, N.C. 781.

the coast of that country, and that in the execution of this duty he had seized the ship in question, which was duly condemned. It was admitted that this plea was sufficient, but a replication was put in that he could not justify under the orders of the Queen of Portugal, as he had entered her service in violation of the provisions of the Foreign Enlistment Act, and therefore his service was unlawful. This replication was held bad. A violation of the Foreign Enlistment Act was a matter between Captain Napier and his own sovereign, but it did not affect the Queen of Portugal, who was not bound by the statute, and was at liberty to employ any one she chose. In this case the seizure was, in fact, perfectly lawful. It was made within Portuguese waters, and was followed by a regular sentence of a prize court. But it would have made no difference to the defendant if it had been absolutely illegal. Any injury arising to an English subject from an act of war by a foreign sovereign, could only be compensated by diplomatic action between the two States (*ante*, § 109). The same rule was applied where the master of an English ship contracted with the Chilian Government to carry to England some prisoners who were sentenced to banishment. On reaching England they indicted him for assault and false imprisonment, and, on appeal, the conviction was affirmed. The Court held that there could be no conviction for what was done within the Chilian territory, for that in Chili the acts of the Government towards its subjects must be assumed to be lawful, and that an English ship, while within the territorial waters of a foreign State, was subject to the laws of that State as to acts done to the subjects thereof. But an English ship on the high seas, out of any foreign territory, was subject to the laws of England; and, therefore, any jurisdiction under the orders of the Chilian Government ceased when the ship passed the line of Chilian jurisdiction. It might be that transportation to England was lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects. But for an English ship the laws of Chili out of the State were powerless, and the lawfulness of the acts must be tried by English law.[1]

§ 118. **Lawful Correction.**—There are a few cases in which the law vests in private persons the right of personal chastisement of those who are under their care. The right

[1] *Per* Erle, C.J., *Reg.* v. *Lesley*, 29 L.J. M.C. 97; S.C. Bell, 220.

exists in the case of parents over their children, of schoolmasters over their scholars, and of masters over their apprentices. The correction must be administered for a proper purpose, and in a suitable manner. For any injury resulting from excessive violence, the person inflicting it is answerable. In a case where a schoolmaster had caused the death of a boy by excessive beating, Cockburn, C.J., said: "A parent, or a schoolmaster, who for this purpose represents the parent, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it is administered for the gratification of passion or of rage, or if it be immoderate and excessive in its degree, or if it be protracted beyond the child's power of endurance, or with an instrument unfitted for the purpose, and calculated to produce danger to life or limb; in all such cases the violence is unlawful, and if death ensues it will be culpable homicide."[1] Where a father beat a child of two and a half years with a strap, and death ensued, Martin, B., said: "The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two and a half years old. Although a slight slap may lawfully be given to an infant by its mother, more violent treatment of an infant by its father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner."[2] Where, however, the correction has been proper and reasonable, if from any unforeseen cause death should ensue, the death will be excused as being accidental.[3] The right of correction possessed by a schoolmaster extends not only to acts done in school, but to acts done on the way to and from school. It is a delegation of parental rights which begins to operate as soon as the child has left his home.[4] The same law applies in the case of master and apprentice;[5] and in the old books it is stated to exist in the case of master over servant generally. Probably the servants there

[1] *Reg.* v. *Hopley*, 2 F. & F. 202. [2] *Reg.* v. *Griffin*, 11 Cox. 402.
[3] 1 Hale, P.C. 474; 1 Hawk, P.C. 85; Foster, Cr. L. 262; 1 East, P.C. 261.
[4] *Cleary* v. *Booth* (1893), 1 Q.B. 465.
[5] *Ibid. ub. sup.*, *Reg.* v. *Keife*, 1 Ld. Raym. 144; Act. XIX. of 1850, s. 14.

meant were youthful apprentices. Certainly no right to beat a servant is recognized by modern law. Dismissal is the only punishment allowed. Nor can a husband justify beating his wife, though in earlier times even this privilege appears to have been admitted.[1]

§ 119. The right of a captain of a merchant ship at sea to inflict corporal punishment upon a seaman for mutinous conduct rests upon the necessities of the case. It was recognized to the fullest extent by Lord Stowell in the case of the *Agincourt*,[2] where he laid it down, that though the punishment inflicted might be more severe than was permissible in the case of an apprentice, yet it must be applied with due moderation, and that "in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and therefore that the person charged should have the benefit of that rule of universal justice of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of natural justice. There are cases, undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases in which the criminal facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt reaction of lawful force, as in the disorders of a commencing mutiny." Lord Stowell added, "Nor do I find that any particular mode or instrument of punishment has received a particular recognition. That must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application."

This case was cited and relied on by Holloway, J., in the case of *Reg* v. *Irvine*,[3] where a master of a ship was indicted under s. 340 for wrongfully confining the mate and carpenter. He told the jury that the captain of a ship had, from the necessity of the case, considerable powers, extending, in the case of disobedient mariners, to the infliction of corporal punishment. That his powers *a fortiori* extended, in case of necessity, to what would, but for those powers, be wrongful restraint. He must, however, be restricted by the necessity

[1] 6 Com. Dig. 543.

[2] 1 Hagg. Adm. 272. See to the same effect, *Lamb* v. *Burnett*, 1 Cr. & J. 291.

[3] First Madras Sessions, 1867.

of the occasion, and for determining upon that necessity, the condition of the ship, in which a whole watch had refused to work, was very material matter for their consideration, but that an act of restraint or confinement, legal in its inception, would become wrongful if the mode used was improper, or the continuance longer than the need demanded. The question of the necessity was not to be too nicely weighed, according to the calm judgment which men in cool blood would form after the event, but by a consideration of the occurrences, as they would appear to a reasonable man placed in the situation of the captain.

§ 120. **Husband and Wife.**—According to English law, the wife is supposed to be subject to such powerful influences by her husband, that in some cases, the extent of which is not very fully defined, she is excused on the assumption that she has been acting under his coercion.[1] Further, there is assumed to be such a complete community of interest between them that neither can bring any criminal charge against the other, except in regard to personal injuries inflicted by one upon the other.[2] Neither of these principles is recognized by the Penal Code. Their application to the case of theft by one of the married couple from the other, will be discussed hereafter in reference to the law of theft. (See *post*, §§ 495—497.)

§ 121. **Mistake.**—Each of the ss. 76 and 79 contains a reservation in favour of a person who, though neither bound nor justified by law in doing a particular act, yet by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes that he is so bound or justified.

The rule as to mistake of fact was stated by Stephen, J., as follows:[3] "I think it may be laid down as a general rule, that an alleged offender is deemed to have acted under that state of facts which he, in good faith, and on reasonable grounds, believed to exist when he did the act alleged to be an offence." This is in accordance with ss. 76 and 79, and with the definition of good faith in s. 52. A person who finds a man in his bedroom at night, under circumstances which lead to the reasonable inference that he has come to commit a burglary, would be justified under s. 103 in shooting him, even though he had come for a perfectly innocent

[1] Steph. Dig. Crim. L., art. 30.
[2] *Reg.* v. *Lord Mayor of London*, 16 Q.B.D. 772.
[3] *Reg.* v. *Tolson*, 23 Q.B.D., p. 188.

purpose.[1] He would not be justified in shooting a woman or a child. He would not be excused if he fired at a person whom he wrongly supposed to be committing a criminal trespass in his paddy field, because even if he were right in his supposition, he would be doing what is not authorized by s. 104. The reasonableness of the belief is again a question of fact, and more indulgence will be shown to a person who has to act on the spur of the moment, especially if he is an officer of justice who is bound to act,[2] than to one who, under the facts assumed, has still time for consideration. A person who hears a man outside his house at night, would be expected to act with more caution, than one who finds a man at his bedside.[3]

§ 122. The extent to which ignorance of an essential fact may be pleaded as a defence to a criminal charge was much discussed in a recent case.[4] The prisoner was indicted under an English statute, which is in substance identical with s. 361 of the I.P.C., for unlawfully taking an unmarried girl under the age of sixteen out of the possession, and against the will, of her father. All the facts were proved, but it was found by the jury that, before the prisoner took the girl away, she had told him that she was eighteen, and that the defendant *bonâ fide* believed that statement, and that the belief was reasonable. Upon a case reserved it was held by fifteen judges (Brett, J., alone dissenting) that the conviction was right. The judgments establish the four following rules:—

I.—*That when an act is in itself plainly criminal, and is more severely punishable if certain circumstances coexist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.* For instance, on a charge of assaulting a policeman in the execution of his duty, under s. 353; or of abducting a child under ten in order to steal from its person, under s. 369; or of lurking house-trespass by night, under s. 444, it would be no defence to establish ignorance that the person assaulted was a policeman; that the child abducted was under ten; or that the hour at which the house was broken into was after sunset.[5]

[1] *Levet's* case, 1 Hale, 42.
[2] *Bhawoo Jivaji* v. *Mulji Dayal*, 12 Bom. 377. See too *Burns* v. *Nowell*, L.R., 5 Q.B. 444.
[3] *Leete* v. *Hart*, L.R., 3 C.P. 322.
[4] *Reg.* v. *Prince*, L.R., 2 C.C. 154.
[5] See p. 176 of the report.

II.—*That where an act is* primâ facie *innocent and proper, unless certain circumstances coexist, then ignorance of such circumstances is an answer to the charge.* For instance, on a charge against a carrier of carrying game sent by an unqualified person; or against a person for sending vitriol not properly marked as such; or against a dealer of being in possession of stores marked with the Admiralty broad arrow; it was in each case a sufficient answer to show that the defendant was ignorant that he was in fact carrying game, or sending vitriol, or that the goods in his possession bore the Government mark.[1]

III.—*That even in the last-named cases, the state of the defendant's mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence.* Where the defendant does the prohibited acts, without caring to consider what is the truth as to the facts, or with notice of circumstances which ought to put him on inquiry, which he avoids, the absence of positive knowledge will be no defence.[2]

§ 123. The difficulty in *Prince's* case was that it came under none of the above three heads. To constitute the offence charged it was necessary to make out four things: *First,* that the person taken away was a girl, that is a female whose years rendered it probable that she was still under guardianship; *secondly,* that she was in fact in the lawful possession of some one; *thirdly,* that she was taken out of that person's possession without his consent; and *fourthly,* that she was under sixteen. Unless all four circumstances were combined, the act was not unlawful, in the sense of being criminally indictable. On the other hand, the absence of the circumstance of age did not make the act innocent and proper, except so far as it exempted it from punishment. It was admitted that if the taker had wrongly believed that he had the guardian's consent to the taking, he would have been excused; so also if he had, though erroneously, believed that the girl was not in the possession, or under the guardianship, of any one.[3]

It was asked, on what ground an erroneous belief as to the existence of two ingredients in the definition of the offence should be a justification, while an equally erroneous belief as to another should be none? This was the ground of Mr. Justice Brett's opinion in favour of an acquittal.

[1] See pp. 162, 165, 168, 176, and Rule V., *post.*
[2] See pp. 169, 177.
[3] See pp. 167, 175.

Different answers were given by the other judges The judgment delivered by Blackburn, J. (p. 170), rests simply on a consideration of the language and object of the statute, as rendering it unlikely that the prisoner's knowledge of the age of the girl could be an essential element in the offence. Mr. Justice Denman (p. 178) considered that the word "unlawfully" which occurs in the English statute must be taken as "equivalent to the words 'without lawful excuse,' using those words as equivalent to 'without such an excuse as, being proved, would be a complete legal justification for the act, even where all the facts constituting the offence exist.'" He further held that as the father had the rights of a natural guardian until the daughter was twenty-one, the act of the defendant in taking her out of his custody, even on the supposition that she was actually eighteen, was an unlawful, though not a criminal act, and, therefore, could not be said to be done "lawfully." This view clearly could not apply in India in the case of Hindu or Mahometan females, with whom, except for the purposes of certain statutes affecting property, minority ceases at sixteen. Probably the most satisfactory, and for Indian purposes the most instructive view, was that taken by Bramwell, B. He said (p. 175):—

"What the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession*, and in that other's *care or charge*. No argument is necessary to prove this; it is enough to state the case. The Legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so, if he did not know that she was in any one's possession nor in the care, or charge, of any one, in those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession or care of any one, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful causes."

In other words, he who does that which is wrong must take the risk of its turning out to be criminal. This would supply us with a further rule, viz.:

IV.—*Where an act which is in itself wrong is, under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime.*

§ 123. This view, and the reasoning of Baron Bramwell, were adopted and followed in a later case,[1] where a woman was convicted of bigamy under an English statute, 24 & 25 Vict., c. 106, s. 5, which is almost identical in its terms with s. 494 of this Code. She had been deserted by her husband, and had married again within seven years, having been informed by his brother that he had been lost in a ship which went down with all on board, and having made inquiries which confirmed the story. As a matter of fact, the husband was still alive, but the jury found that she had, at the time of her second marriage, believed he was dead, in good faith, and on reasonable grounds. Her case came literally within the statute, but the majority of the judges held that the conviction was bad. She was mistaken in the cardinal fact which constitutes bigamy, and her conduct differed from that of *Prince*, since, taking the facts to be as she supposed them, the act done by her and the motives for doing it were natural and legitimate.[2]

It may be observed that the wording of s. 79 is strongly in favour of this construction. The mistake of fact must lead the person to believe in good faith that he is "justified by law in doing it." Not merely that his act is negatively not punishable, but that it is innocent and legal, neither in excess of his own rights, nor in violation of the rights of others.

§ 124. V.—*Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording and object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial.* For instance, where a statute rendered it an offence to receive a lunatic into an unlicensed house, a conviction was upheld, though the jury found that the defendant honestly and on reasonable grounds believed that the person received was not a lunatic.[3] And similarly under a statute which made it an offence to sell intoxicating liquor to any drunken person, it was held that the offence

[1] *Reg.* v. *Tolson*, 23 Q.B.D. 168. [2] *Per* Stephen, J., p. 191.
[3] *Reg.* v. *Bishop*, 5 Q.B.D. 259.

was committed though the purchaser had given no indication of intoxication, and the vendor did not know that he was drunk.[1] On the other hand, where a statute provided that every person having in his possession an animal affected with a contagious disease, should with all practicable speed give notice to a police officer, it was held that the reasonable construction to be put upon the words imported the necessity of knowledge in the person charged with contravening the rule.[2]

§ 125. **Mistake, or Ignorance, of Law** is no defence. The rule is generally put in this way, that every person who has capacity to understand the law is presumed to have a knowledge of it.[3] In the majority of cases this is true in fact as well as in theory. Many persons may be unacquainted with the law of theft, but every one knows that he ought not to take what is not his. The refinements of criminal law are generally based upon feelings of right and wrong, which are common to all. But even where this is not so, the law of every country must be worked on the principle that no one can break it with impunity by alleging, even truly, an ignorance of its provisions. Those who are most interested in infringing a law would be the readiest to set up a plea of ignorance, which it would be impossible to disprove. The rule is enforced against foreigners as well as against natives of the country. Two foreigners were charged with murder, as having been seconds in a duel which terminated fatally. An application was made to release them on bail pending trial, and it was urged in an affidavit made on their behalf, that they were Frenchmen, and that by the law of France duelling was no offence. It was held that this plea would be no defence at the trial, and could be no ground for indulgence before trial. Coleridge, J., said: "Foreigners who come to England must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for crime, nor can it any more be urged in favour of a foreigner."[4]

§ 126. Even in a case where an act was innocent before, and was for the first time made an offence by statute, a

[1] *Cundy* v. *Le Cocq*, 13 Q.B.D. 207.

[2] *Nichols* v. *Hall*, L.R., 8 C.P. 322. See also Rule II., *ante*, § 122, and *ante*, §§ 10—12.

1 Hale, 42.

). 59.

physical impossibility that the prisoner could have known of the statute was held to be no absolute bar to a conviction. The judges, however, recommended that the prisoners should be pardoned, they having shown that they were at sea when the statute was passed, and that they could not possibly have been aware of it.[1]

In a similar and more recent case, Baggallay LJ., said: "Before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may, of itself, be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account, when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued."[2] Suppose, for instance, that an Act of Parliament was passed in England, applicable to India, which came into operation as soon as the royal assent was given, and that an offence against it was committed in India a week after it came into operation, before the Act could have arrived, or been promulgated in India; I do not think it could be contended that the law was in force in India at the time the act was committed.

§ 127. Mr. Bishop remarks upon this point:[3] "In civil causes it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence, if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act, in some precise mental condition, which mental condition is the gist of the offence, the jury, in determining the question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus to constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken belongs not to the

[1] *Reg.* v. *Bailey*, Russ. & Ry. 1.
[2] *Burns* v. *Nowell*, L.R., 5 Q.B. 454.
[3] Bishop, s. 378.

latter. Yet if all the facts concerning the title are known to the accused, and so the question is merely one of law whether the property is his or not, still he may show, and the showing will be a defence to him against criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one who does not himself believe it to be valid, does not prevent the act of taking from being larceny."

The same view has been taken in England. In *Reg.* v. *Reed*,[1] Coleridge, J., said: "Ignorance of the law cannot excuse any one, but at the same time, when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony." And so it was held where a poacher forcibly retook from a gamekeeper snares which he had set, in ignorance of a statute which entitled the gamekeeper to seize them.[2]

§ 128. **Judicial Immunity—Civil Suits.**—The protection given to judges by s. 77 appears substantially to conform to the English law. As regards civil suits, the general principle is, that judges are protected from suits for things done within their jurisdiction, though erroneously or irregularly done, but that when they act wholly without jurisdiction, whether they may suppose they had it or not, they have no privilege.[3] In the well-known case of *Kemp* v. *Neville*,[4] the whole law on this subject was exhaustively discussed by Erle, C.J., in an action for assault and imprisonment brought by the plaintiff against the Vice-Chancellor of the University of Cambridge. By the charter of the University the proctors had power to arrest, and the Vice-Chancellor had power to imprison any women who were, or were reasonably suspected of being, improper women. The plaintiff, who in fact was a perfectly virtuous woman, was arrested and imprisoned under these powers. The jury found that the proctors who took her before the Vice-Chancellor had reasonable cause of suspicion; that the defendant had not made due inquiry into the plaintiff's character, and that the punishment was undeserved. On these findings it was held that the judgment must be entered for the defendant. Erle, C.J., said: "The rule that a judicial officer cannot be sued for an adjudication, according to the best of his

[1] Car. & M. 308. [2] *Reg.* v. *Hall*, 3 C. & P. 409.
[3] See *per* Parke B., *Calder* v. *Halket*, 2 M.I.A., at p. 307.
[4] 10 C.B. N.S. 523; 31 L.J. C.P. 158.

judgment, upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, has been uniformly maintained." In many of the cases a special immunity is ascribed to an officer who is acting as judge of a court of record.[1] Practically, however, this circumstance seems to be of little importance. In a case where churchwardens acted as returning officers at an election, and an action was brought against them for rejecting a vote, Cresswell, J., said: "Here the defendants may not be judges, but they are quasi-judges. They had to exercise an opinion upon the matter whether the plaintiff was entitled to vote or not. Having decided against the plaintiff without malice or any improper motive, it would be monstrous to subject them to an action."[2]

§ 129. Whether a judge acting within his jurisdiction can ever be liable to an action for a judicial act, even though it were done maliciously, oppressively, or corruptly, is a question which until lately has been unsettled, no case having arisen in which the facts rendered it necessary to decide the point. In *Taaffe* v. *Lord Downes*,[3] the Chief Justice of the King's Bench in Ireland was sued for issuing a warrant of arrest, which appears to have been illegal. He pleaded that he did the act in the discharge of his judicial functions as Chief Justice. The plaintiff demurred, and the demurrer was overruled. Mayne, J., in deciding for the defendant, admitted that if he had made the warrant the fraudulent cover for oppression, or corruption, or malice, the plaintiff could prove that upon the plea, and apparently considered that the proof of such facts would support the action. In the more recent case of *Fray* v. *Sir Colin Blackburn*,[4] Crompton, J., said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly." The only other case of the sort to be found in the books is *Hammond* v. *Howell*,[5] where the suit was against the Recorder of London for an

[1] According to the English phraseology, every court which has power to fine and imprison is a court of record: 2 Bac. Abr. 391, *per* Erle, C.J., 10 C.B. N.S., p. 547; 31 L.J. C.P., p. 164.

[2] *Tozer* v. *Child*, 7 E. & B. 377; 26 L.J. Q.B. 151; and *per* Lord Esher, M.R., *Anderson* v. *Gorrie*, *post*, § 129.

[3] 3 Moo. P.C. 36 n., at p. 39.

[4] 3 B. & S. 676, at p. 678.

[5] 1 Mod. 84; 2 Mod. 218.

erroneous judgment, and the Court said that the action was worse than the injury. In none of these three cases was there any allegation of corrupt or oppressive behaviour. This element was supplied in the latest case on the subject, in which all the previous authorities were reviewed.[1] There an action was brought against three judges of a colonial court to recover damages for acts done in the course of judicial proceedings. The jury found as to the defendant *Cook*, "that he had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice," and they assessed damages at five hundred pounds. The judge, Lord Coleridge, C.J., directed judgment to be entered for the defendant, on the ground that no action will lie against a judge of a court of record in respect of acts done by him in his judicial capacity. This judgment was affirmed on appeal, Lord Esher, M.R., after pointing out that the acts complained of were done in the course of proceedings, which were within the jurisdiction of the judge, and that the acts found to have been committed by the judge amounted to a gross dereliction of duty, for which he could be removed from office, proceeded as follows: "But the existence of a remedy would not of itself prevent an action by a private person; so that the question arises, whether there can be an action against a judge of a court of record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England, it is the law that no such action will lie, the ground alleged from the earliest times as that on which this rule rests is, that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice." Lord Esher then cited the cases below,[2] and said: "To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious, and the acts or words are not done or

[1] *Anderson* v. *Gorrie* (1859), 1 Q.B. 688.

[2] *Miller* v. *Hope*, 2 Shaw, Scotch App. 125; *Haggard* v. *Pelicier* (1892), A.C. 61, at p. 68; *Fray* v. *Blackburn*, 3 B. & S. 576, at p. 578; *Scott* v. *Stansfield*, L.R., 3 Ex. 220; and the conflicting *dictum* of Cockburn, C.J., in *Thomas* v. *Churton*, 2 B. & S. 475, at p. 479.

spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction, a different set of considerations arise. The only difference between judges of the superior courts and other judges consists in the extent of their respective jurisdiction."

§ 130. Where a judge has jurisdiction over the subject-matter, the person, and the place, he does not act without jurisdiction, merely because he does something which, or in a way which, the law does not warrant. In a case where an ecclesiastical judge was sued for unlawfully excommunicating a defendant,[1] Blanc, J., said; "The distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the court had proceeded without any jurisdiction. It seems to me that this is not the case of a court having proceeded altogether without jurisdiction, but of a court having jurisdiction, and having, in the course of it, come to an erroneous conclusion, which has been the cause of the damage." The same principle has been frequently laid down by the Privy Council, in cases under s. 622 of the Civ. P.C. of 1882.[2]

§ 131. Where a judge has general jurisdiction over a particular subject-matter, but is under certain limitations as to place, person, or value; there if he knows, or ought to know that the special facts exist which oust his jurisdiction, he is liable for anything he does under colour of an authority which he knows that he does not possess. But if the facts are not within his knowledge, it is the duty of the party who relies upon them to bring them to his notice, and if he fails to do so, no action lies against the judge if he believes he possesses the jurisdiction which he exercises.[3] This was the ground of the judgment in *Calder* v. *Halket*, already cited. There an action of trespass was brought against the defendant, a judge in a criminal court in Bengal, for arresting and detaining the plaintiff, a European British subject, on a charge of riot. The defendant had no jurisdiction over such

[1] *Ackerley* v. *Parkinson*, 3 M. & S. 411, p. 427.

[2] *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*, 11 I.A. 237; 11 Cal. 6.

[3] *Gwinne* v. *Poole*, 2 Lutw. 387; *Houlden* v. *Smith*, 14 Q.B. 841.

a person, except for the purpose of committing him for trial to the Supreme Court. The Judicial Committee held that the action must fail, because, "In the case now under consideration, it does not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact."[1]

Where a justice of the peace can only issue a warrant upon a definite charge being made, and an information on oath laid before him, he will be liable to an action of trespass if he issues a warrant without them.[2] But if an information is in fact laid before him, he is not liable, though the information contained no legal evidence, either of any offence, or of the plaintiff's participation in it.[3]

§ 132. **Criminal Liability.**—There is very little to be found in the English law books as regards the criminal liability of judicial officers for acts done in their judicial capacity. Lord Hale discusses at considerable length the case of persons executed under illegal sentences.[4] He says: "If he that gives judgment of death against a person, hath no commission at all, if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it is *coram non judice.*" And so it is if the commission gives jurisdiction over a particular class of persons, or under particular circumstances, and it is executed against persons not included in the class, or under different circumstances. For instance, the execution by martial law in time of peace of persons who are not listed under the military power is murder. On the other hand, every intendment will be made in favour of the judicial power. If a judge has jurisdiction to pass sentence of death under one commission, it will not be murder, though he professes to act under another commission. And where the sentence is passed under a commission which has terminated without the knowledge of the judge, as by the King's death under the old law, he is not liable. Nor where there is jurisdiction, even though there has been an irregularity sufficient to cause a reversal of the sentence, such as holding the trial on a day to which

[1] 2 M.I.A., p. 310. [2] *Gasper* v. *Mytton*, Taylor, 291, p. 329.
[3] *Cave* v. *Mountain*, 1 M. & G. 257.
[4] 1 Hale, P.C. 496—502: follld. 1 Hawk, P.C. 8; 1 East, P.C. 334.

the court had not been adjourned. The law was laid down similarly by Cockburn, C.J., in the case of *Reg.* v. *Nelson.*[1] He said:

"When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it, or in excess of the power of the tribunal, in such cases the persons acting with judicial authority would not be criminally responsible; but supposing that there is no jurisdiction at all, that the whole proceeding is *coram non judice*, that the judicial functions are exercised by persons who have no judicial authority or power, and a man's life is taken, that is murder; for murder is putting a man to death without a justification, or without any of those mitigating circumstances which reduce the crime of murder to one of low degree. Thus in the case put by Lord Coke of a lieutenant having a commission of martial law, who puts a man to death by martial law in time of peace, that, says Lord Coke, is murder."[2] In another part of his charge, the Chief Justice said:

"Again, on the second branch of the case, in which we take the legality of martial law for granted, if you think that although there may have been a mistake, and a most grievous mistake, in condemning and sending this man to death, yet that the proceedings were done honestly and faithfully, and in what was believed to be the due course of the administration of justice, again I say you ought not to harass the accused persons by sending them for trial to another tribunal."

§ 133. I am not aware of any case in which one of the higher judges has been prosecuted criminally in respect of any judicial act. The case of *R.* v. *Loggen*,[3] in which the chancellor of the Bishop of Sarum was convicted of extortion for compelling an executor to take out probate in the bishop's court, when he had already taken out probate in the court of the archbishop, was expressly decided on the ground that he was acting not judicially, but ministerially. Numerous cases, however, are to be found of applications for an information[4] against justices of the peace. The law on this subject is stated as follows in 4 Bac. Abr., p. 631: "Any fraud or misconduct imputed to magistrates in pro-

[1] Cockburn, pp. 124, 156.

[2] Under s. 300 of the Penal Code, Exception 3, such an act might be reduced to culpable homicide not amounting to murder.

[3] 1 Stra. 74.

[4] See as to this, 4 Bac. Abr. 402.

ceeding, notwithstanding the issue of a *certiorari*, may be a ground for a criminal proceeding against them; and Lord Kenyon said [1] he believed there were instances in which a criminal information had been granted against magistrates acting in sessions. But these must have been instances of manifest oppression and gross abuse of power. For generally the justices are not punishable for what they do in sessions." For instance, a criminal information was granted against justices of sessions, who had ordered a woman, who had damned an alderman, to be whipped under a statute of 12 Ann., which only applied to vagrants. The Court "observed that the construction that was made upon the words of the Act was so notoriously groundless, that what the justices did they took to be manifestly an act of oppression." [2] And so where justices of the peace had either refused to grant, or had granted, licences to publicans, not upon the merits of the application, but corruptly for motives of personal advantage to themselves.[3] The same course was adopted where justices of the peace, apparently from mere whim, had discharged a vagrant who had been committed by another justice. Ashurst, J., said: "This, therefore, was gross misbehaviour in the defendants, which cannot be imputed to mistake or ignorance of law. And though they have denied generally that they acted from any interested motive in this business, yet that is not sufficient, for if they acted even from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations." [4] On the other hand, the Court of King's Bench has frequently declared "that even where a justice of the peace acts illegally, yet if he has acted honestly and laudably, without oppression, malice, revenge, or any bad view or intention whatsoever, the Court will never punish him in the extraordinary course of an information, but will leave the party complaining to the ordinary legal remedy —by action or indictment.[5] Practically, I believe, it will be found that where the appropriate proceeding by information has failed, no attempt has ever been made to prefer an indictment.

[1] *R.* v. *Seton*, 7 T. R. 373.
[2] *R.* v. *Mather*, 2 Barnardiston, 249.
[3] *R.* v. *Davis*, 3 Burr. 1317; *R.* v. *Holland*, 1 T. R. 692.
[4] *R.* v. *Brooke*, 2 T. R. 190.
[5] *Per curiam*, *R.* v. *Palmer*, 2 Burr. 1162; *R.* v. *Justices of Sleaford*, 1 W. Bl. 432; *R.* v. *Jackson*, 1 T. R. 653; *R.* v. *Badger*, 4 Q.B. 468.

§ 134. **Judicial Officers in India** are in a more favourable position as regards civil suits than they are in England. Act XVIII. of 1850 provides that—

"No judge, magistrate, justice of the peace, collector, or other person acting judicially, shall be liable to be sued in any civil court for any act done, or ordered to be done, by him in the exercise of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court, or other person bound to execute the lawful warrants or orders of any such judge, magistrate, justice of the peace, or other person acting judicially, shall be liable to be sued in any civil court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The protection given to judges under this Act only applies where the defendants have used "due care and attention" (s. 52), or, in the language of the Privy Council, "where parties *bonâ fide*, and not absurdly, believe that they are acting in pursuance of statutes and according to law."[1]

§ 135. Where the error as to jurisdiction under which the judge acts is one of law, the question will be, *first*, whether as a matter of fact he believed that he was acting legally; *secondly*, whether this belief was one which, with reference to his position and attainments, the difficulty of the matter under discussion, and the opinions entertained upon it by others, he might reasonably have held; or whether the mistake is one which is so irrational that it can only be ascribed to perverseness, malice, or corruption.[2] On the other hand, it has been held that where he has jurisdiction he is protected by the statute, even though he has discharged his duties erroneously, irregularly, or illegally, and without believing, in good faith, that he had jurisdiction.[3] It is evident that jurisdiction is a question of law, which cannot be affected by any mistake as to its existence on the part of the officer. If, however, the facts are that a judge has acted illegally within his jurisdiction, knowing that he was acting illegally, and believing that he had not even

[1] *Per* Lord Campbell, *Spooner* v. *Juddow*, 4 M.I.A., p. 479.

[2] *Seshaiyangar* v. *Ragunatha Row*, 5 Mad. H.C. 345; *Ragunada Row* v. *Nathamuni*, 6 *ibid.* 423; *Collector of Sea Customs* v. *Chithambaram*, 1 Mad. 89.

[3] *Teyen* v. *Ram Lall*, 12 All. 115.

jurisdiction to act at all, the conclusion would seem clear that he must be acting oppressively and maliciously, and probably corruptly. His liability would then depend upon the considerations which are discussed in § 129.

§ 136. It will be observed that the language of s. 77 is very different from that of Act XVIII. of 1850. "Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law." It is not stated that he is protected if he acts without jurisdiction, under a belief entertained in good faith that he had jurisdiction. If any such protection was intended to be given to him, it is curious that the very clear words of the former Act should not have been followed, especially as the next section shows that the Legislature had in view the possibility that judgments or orders might be passed without jurisdiction. In such a case the ministerial officer is given an immunity which does not appear to be granted to the judge. Should the question ever arise in India, the question will turn upon the meaning of the word "power" in s. 77. Is it limited to a power attached to the jurisdiction which the officer actually possesses, and which he may exercise erroneously without exceeding his jurisdiction (*ante*, §§ 130, 131, 132)? or does it include a power which assumes a jurisdiction different from any which is vested in him? In the former case he uses his power wrongly, or in circumstances to which it does not apply; in the latter case he uses a power which he never had, and his action is *ultra vires* and a nullity. The judgment in the case of *Calder* v. *Halkett*[1] appears to have an important bearing upon this point. There the Judicial Committee had to construe a statute which forbade an action in the Supreme Court "against any person whatsoever, exercising a judicial office in the county courts, for any decree, judgment, or order of the said court." They rejected the view that "it may mean to protect the judge only when he gives judgment, or makes an order in the *bonâ fide* exercise of his office, and under the belief of his having jurisdiction, though he had not." They held that it was intended to place such judges on the footing of English judges of a similar class, "protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but

[1] 2 M.I.A., 293 at p. 306.

leaving them liable for things done wholly without jurisdiction."

§ 137. Whatever may be the extent of the protection given by the section, the nature of the acts to which it applies is pointed out by the Privy Council in the case just cited,[1] where they said: "It is not merely in respect of acts in court, acts *sedente curiâ*, that a judge has an immunity, but in respect of all acts of a judicial nature; and an order under the seal of the Foujdary Court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was irregularity or error in it or not, would be dispunishable, by ordinary process of law."

On the other hand, the protection given to an officer under s. 77 will depend upon whether he professes to be acting judicially or not. A collector acting under the Madras Regulations V. and IX. of 1822, or under the Bengal Act X. of 1859, will be protected, since he comes under the terms of s. 19. But if he were merely arranging a revenue question, he would not be acting judicially at all; and it has been held in Bengal that a magistrate removing an obstruction under the conservancy provisions of Bengal Act VI. of 1868, is not acting judicially, and is not protected from civil suit by Act XVIII. of 1850, and therefore, of course, not from criminal proceedings under s. 77.[2] On this principle it was held by the Judicial Committee, that the arrest and confinement of a supposed lunatic by the officer commanding a cantonment was not protected by Act XVIII. of 1850, as he was not a judicial officer and was not acting judicially.[3] Under the Crim. P.C., s. 142, no suit can be brought against a magistrate who, in an urgent case, issues an injunction to prevent imminent danger or serious public injury from a nuisance.

The Criminal Procedure Code sets out in s. 529 the cases in which the proceedings of a magistrate, who has in good faith done acts which he was not empowered to do, shall not be set aside. Section 530 states the cases in which proceedings similarly unauthorized shall be void.

§ 138. **Ministerial Officers.** — The protection given to

[1] 2 M.I.A., p. 308.

[2] *Chunder Narain* v. *Brijo*, 14 B.L.R. 254; S.C. 21 Suth. 391; compare *Collector of Hoogly* v. *Tarak Nath*, 7 B.L.R., 449; *Keshav* v. *Lakshman*, 1 Bom. 176.

[3] *Sinclair* v. *Broughton*, 9 I.A. 152.

ministerial officers acting under the authority of a court of justice is in terms rather less than that which is given to them against civil suits by Act XVIII. of 1850 (*ante*, § 134), and rather more than is given to the public generally by s. 79. It is less than that given by Act XVIII. of 1850, inasmuch as under that Act the warrant is an absolute protection to the officer so long as he obeys it, whether it was lawful or unlawful, and whether it was issued with or without jurisdiction. Under s. 78, where the court had no jurisdiction to issue the order, it is necessary further to show that the officer acting upon the order in good faith believed that the court had jurisdiction. On the other hand, s. 78 goes beyond s. 79, since under the former section a mistake in law may be pleaded as justification, while under the latter section the mistake must be one of fact. Practically the burthen of proof thrown upon the ministerial officer will vary very much according to his position, and to the amount of care and knowledge which he is expected to exercise in that position. Every such officer will be held harmless, if he acts on a warrant which is valid on its face, and which is issued by a person who had jurisdiction to issue it. It is neither his right nor his duty to go behind the warrant.[1] Where, however, the order was issued without jurisdiction, the absence of jurisdiction may be apparent to one subordinate and not to another. The officer in charge of a gaol would not, I should think, be protected, if he carried out a sentence of whipping upon a prisoner, received under a warrant of conviction, for a crime for which whipping could not possibly be awarded. It is his duty to examine the warrant, and to compare the punishment with the crime. On the other hand, if the warrant recited a previous conviction within ss. 3 or 4 of the Amended Whipping Act, and awarded whipping accordingly, this would shield the officer in charge of the gaol, although no evidence had been given of a previous conviction, and no such previous conviction had taken place. The gaol peon who actually inflicted the lashes would not be punishable in either case, as he would know nothing of the offence for which the prisoner was in custody, and still less of the punishment appropriate to it. Probably the courts would adopt the rule laid down by the authorities cited in paragraph 95 of this work—that a subordinate will always be held harmless,

[1] *Henderson* v. *Preston*, 21 Q.B.D. 362.

if he obeys an order given by a judicial superior, which is not on its face manifestly illegal.

§ 139. The above remarks assume that the order, whether originally lawful or not, has been carried out by the officer in a legal manner, the legality of his own acts being a matter for which he is personally liable. For instance, a bailiff is not protected if, being entrusted with civil process, he arrests a witness on his way to court who, as such witness, was privileged *eundo morando et redeundo*, and if he persists in the arrest after due notice of facts;[1] or if he breaks open a house, in executing process against the movable property of a judgment debtor.[2] This subject will receive further discussion in the sections on the right to arrest, which immediately follow, and also in considering the right of private defence against the acts of public officers (*post*, §§ 204—214).

§ 140. **Right to Arrest.**—Questions under ss. 76, 78 and 79 will often arise where acts, professedly done on behalf of the law, are so done, either by public officers who consider that they are bound to do them, or by private persons who consider that they are justified in doing them. These cases resolve themselves into the following heads—

First.—Acts done under criminal process.

(1) By police officers acting (*a*) with or (*b*) without warrant;

(2) By private persons (*a*) with or (*b*) without warrant.

Second.—Acts done under civil process.

§ 141. *First.*—1. (*a*) Where a police officer acts under a warrant, the only questions that can arise are as to the authority of the person who issued the warrant, and the legality of the mode in which it has been executed. Warrants for the arrest of suspected persons are governed by the Crim. P.C., 1882, ss. 75—85.[3] Search warrants are governed by ss. 96—98, 101, 102. The right of resistance by way of self-defence to an irregular or unlawful arrest or other proceeding by virtue of a warrant will be discussed hereafter (*post*, §§ 204—214).

1. (*b*) The offences for which a police officer may arrest without warrant are stated in column 3 of the Schedule

[1] *Thakurdoss* v. *Shanker*, 3 Suth. Cr. 53.

[2] *Anderson* v. *McQueen*, 7 Suth. Cr. 12.

[3] Who may issue, s. 75; to whom addressed, ss. 77, 78, 83; by whom executed, s. 79; mode of executing, ss. 46, 80; in any place in British India, s. 82; beyond local jurisdiction of court of issue, ss. 83, 84; person arrested to be brought at once before magistrate, ss, 81, 85.

annexed to the Crim. P.C. He may also arrest without warrant—

First.—Any person who has been concerned in any cognizable offence (see s. 4 (*q*)), or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned;

Secondly.—Any person having in his possession, without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking;

Thirdly.—Any person who has been proclaimed as an offender either under this Code (s. 87), or by order of the Local Government;

Fourthly.—Any person in whose possession anything is found which may reasonably be suspected to be stolen property, and who may reasonably be suspected of having committed an offence with reference to such thing;

Fifthly.—Any person who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

Sixthly.—Any person reasonably suspected of being a deserter from Her Majesty's Army and Navy; and

Seventhly.—Any person who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), or otherwise, liable to be apprehended or detained in custody in British India (Act III. of 1894, s. 3).

This section applies to the police in the towns of Calcutta and Bombay.[1]

Similar powers of arrest are given to officers in charge of police stations in regard to vagabonds and criminal characters;[2] and to all police officers, in regard to persons who are designing to commit any cognizable offence, if they cannot otherwise be prevented.[3] Where any person in the presence of a police officer commits, or is accused of committing a non-cognizable offence (s. 4 (*q*)) and refuses on demand of

[1] Crim. P.C., s. 54. [2] Crim. P.C., s. 55.
[3] Crim. P.C., s. 151.

a police officer to give his name and residence, or gives a name and residence which the officer has reason to believe to be false, he may be arrested and kept in custody till his true name and residence are ascertained.[1]

Similar powers of arrest without warrant are given to police officers by the Police Act, V. of 1861, s. 34, the Public Gambling Act, III. of 1867, s. 13, the Criminal Tribes Act, XXVII. of 1871, ss. 20, 26, the European Vagrancy Act, IX. of 1874, s. 19, the Reformatory Act, V. of 1876, s. 24, the Forest Act, VII. of 1878, s. 63, the Arms Act, XI. of 1878, s. 12, the Indian Emigration Act, XXI. of 1883, s. 82, cl. (2), the Indian Explosives Act, IV. of 1884, s. 13, the Cantonments Act, XIII. of 1889, s. 15, the Indian Railways Act, IX. of 1890, s. 132.

A chowkidar, or village watchman, is not a police officer within the meaning of the above sections of the Crim. P.C.[2]

§ 142. "What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the police any power to arrest persons, as they appear sometimes to do, merely on the chance of something being hereafter proved against them."[3] The above language was used with reference to the Crim. P.C., 1861, s. 100, cl. (2), which did not contain the words in s. 54 of the Code of 1882, "or credible information has been received." The latter words give considerable latitude to the police. It is a well-known principle of criminal law, which is recognized by s. 125 of the Evidence Act of 1872, that "no magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence." The persons from whom information is obtained are frequently spies, who would unhesitatingly deny having given the information. It would seem, therefore, that when a police officer makes an arrest upon information received, and swears that he received such information, which he believed to be well-founded, his statement must be held sufficient, unless there is adequate reason for imputing improper motives to his action.[4]

[1] Crim. P.C., s. 57.

[2] So held in reference to s. 92 of Act X. of 1872, which corresponds to s. 54 of the Act of 1882; *Empress* v. *Kallu*, 3 All. 60.

[3] *Reg.* v. *Belury Sing*, 7 Suth. Cr., p. 5.

[4] *Reg.* v. *Amarsang*, 10 Bom. 506.

§ 143. Property cannot be said to be "reasonably suspected to be stolen property" where it is openly possessed, and exposed to view, under circumstances which invite and admit of inquiry, and as to which no inquiry is made.[1] On the other hand, the present Crim. P.C. goes beyond that of 1861, s. 100, which required that the property should be proved to have been actually stolen property. Reasonable suspicion under circumstances which are in themselves suspicious, and which require immediate action to be taken, will justify such action under s. 54, cl. 4.[2] No complaint need be made to the police officer, who can act upon his own judgment.[3]

"Any magistrate may at any time arrest, or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent, at the time and in the circumstances, to issue a warrant."[4]

§ 144. **The law as to entering houses** in order to effect arrest, is laid down as follows by the Crim. P.C., 1882, ss. 47—49.

47. If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

48. If ingress to such place cannot be obtained under s. 47, it shall be lawful in any case for a person acting under a warrant, and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer, to enter such place and search therein, and

In order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided that, if any such place is an apartment in the

[1] *Sheo Surun Sahai* v. *Mahomed Fazil Khan*, 10 Suth. Cr. 20.
[2] *Bhawoo Jivaji* v. *Mulji Dyall*, 12 Bom. 377. See *post*, § 499.
[3] *Reg.* v. *Gowroo Singh*, 8 Suth. Cr. 28. [4] Crim. P.C., s. 65.

actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

49. Any police officer or other person authorized to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

§ 145. This is substantially in accordance with the law of England. "Where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before mentioned having been previously made."[1] So when a felony is not yet committed, but is in danger of being committed, as if there be an affray in a house, where there is likely to be manslaughter or bloodshed committed, a constable may break open the door to keep the peace, and prevent danger.[2] "Where an affray is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence, fly to a house, and are immediately pursued by him, and he is not allowed to enter, in order to suppress the affray in the first case, or to apprehend the affrayers in either case," the house may be broken open.[3]

It does not seem quite clear what the English law is as to the right of a constable to break open doors without a warrant to arrest a person upon mere suspicion. Lord Hale says that where a felony has actually been committed, and a person has been pointed out to the constable as the felon, or there is reasonable ground to suspect him, it is lawful to break open doors in pursuit.[4] But later writers say that even where a felony has actually been committed, a constable who does so without a warrant, acts at his own peril, if it should turn out that the suspected person is innocent.[5]

[1] Foster, Cr. L. 320.
[2] 2 Hale, P.C. 94, 95.
[3] 2 Hawk, P.C. 136.
[4] 2 Hale, P.C. 94.
[5] Foster, Cr. L. 321; 1 East. P.C. 322.

In no case can he lawfully act upon mere suspicion, where there has been no felony at all. Under the Crim. P.C., the right to break open doors seems coextensive with the right to arrest, whether with or without warrant, and therefore to exist upon reasonable suspicion in case of serious crimes.

§ 146. **Resistance to arrest.**—Where the person whose arrest is attempted "forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person making the arrest may use all means necessary to effect the arrest. Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death, or with transportation for life."[1]

Offences are punishable with death under the Penal Code, ss. 121, 132, 194, 302, 303, 305, 307, and 396; and with transportation for life, under ss. 121, 121A, 122, 124A, 125, 128, 130, 131, 132, 194, 195, 222, 225, 226, 232, 238, 255, 302, 304, 305, 307, 311, 313, 314, 326, 329, 364, 371, 376, 377, 388, 389, 394, 396, 400, 409, 412, 413, 436, 438, 449, 459, 467, 472, 474, 475, and 477. These sections comprise the most serious offences against the State and the administration of justice, against person and property. In this respect the Indian law is less severe than that of England, which authorized the killing of any person who, having committed a felony, resisted his apprehension, or fled to avoid it, provided his arrest could not be effected by any milder means; and the same rule applied, though the person suspected was innocent, and even where no felony had in fact been committed, provided the person attempting his arrest was a constable acting under a warrant, or upon reasonable suspicion or credible information.[2]

§ 147. It must be remembered, however, that though s. 46 of the Crim. P.C. does not authorize the killing of a suspected person, merely for the sake of effecting his arrest, if his offence is one punishable in a lesser degree than by death or transportation for life, it does not deprive the police officer of his right of self defence, if the resistance is such as would justify him in causing death in defence of his own person under s. 100 of the Penal Code. Under s. 99 of the Code there is no right of self-defence against the act of a public servant acting, and known to be acting, in discharge of his duty (see *post*, §§ 204—214). Constables who

[1] Crim. P.C., s. 46.

[2] 1 Hale, P.C. 489, 490; 1 Hawk. P.C. 81; 1 East, P.C. 298, 300; Foster, Cr. L. 271.

are entrusted with a warrant, or who have reason to suppose that crimes of particular gravity have been committed by a specified person, are bound to arrest the person, and are punishable if they fail to do so. They cannot desist upon a mere show of resistance. They are bound to redouble their efforts, even at the risk of their lives, if opposed; and the law protects them from any consequences which the resistance entails.[1]

§ 148. The words in the Crim. P.C., s. 46, "attempts to evade arrest," apply, I presume, to the case of a person who, without resistance, flies to avoid arrest. Under English law the same amount of violence might be used, if necessary, against a suspected person who fled as against one who resisted, though of course the burthen of proof that violence was necessary would be heavier.[2] Section 66 of the Crim. P.C. authorizes the pursuit and arrest of any person who, being in lawful custody, escapes or is rescued. Section 67 applies to such cases the provisions of ss. 47, 48, and 49 (*suprà*, § 144), though, curiously enough, it makes no reference to the very important provision in s. 46. By English law, gaolers and their assistants have the same duties and rights in securing the safe custody of the prisoners in their charge, that police officers have in arresting under a warrant. If they are resisted in the execution of their duty in gaol, or in an attempt by the prisoner to break out of gaol, they are justified in using such violence as is necessary, even to the extent of causing death. The cause for which the prisoner is in gaol, whether civil or criminal, is immaterial, for the gaoler is bound at all hazards to keep him safely.[3] All the passages referred to below speak of active resistance to the gaoler, who is said to be entitled to repel force by force without retreating. A mere escape without violence would, I presume, come under the rules applicable to escape from arrest, in which case the amount of violence which may be used depends upon the cause of the arrest.[4] For instance, where the arrest is in cases of misdemeanour by English law, which correspond to non-cognizable offences under Indian procedure,[5] or for breach of the peace, it is not lawful to kill the party

[1] 1 Hale, P.C. 494; 2 Hale, P.C. 85; 1 East, P.C. 300.
[2] See authorities cited, *suprà*, § 146.
[3] 1 Hale, 481, 496; 1 Hawk. P.C. 81; 1 East, P.C. 330; Foster, Cr.L. 321.
[4] 1 Hale, P.C. 481.
[5] Crim. P.C., s. 419.

accused if he fly from arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him.[1] The same rule holds good where the arrest is on civil process.[2]

§ 149.—2. **Private persons** are in some cases bound to aid the course of criminal justice; in other cases they are authorized, but not bound, to do so.

(A) By the Crim. P.C., s. 42—

"Every person is bound to assist a magistrate or police-officer reasonably demanding his aid, whether within or without the presidency towns,

(*a*) in the taking of any other person whom such magistrate or police officer is authorized to arrest;

(*b*) in the prevention of a breach of the peace, or of any injury attempted to be committed to any railway, canal, telegraph, or public property; or

(*c*) in the suppression of a riot or an affray."

(B) Under the following sections they are authorized, but not bound, to aid—

43. When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

59. Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender;

and shall, without unnecessary delay, make over any person so arrested to a police officer; or, in the absence of a police officer, take such person to the nearest police-station.

§ 150. If these sections are to be taken as exhausting the cases in which a private person may arrest an offender, they certainly fall far short of the English law. In England it is well settled that a private person has just the same right to arrest a felon, even though he has not witnessed the commission of the crime, as a police officer, and that he may use the same means in securing his person. The difference between the cases is, that a police officer may justify his act upon a reasonable suspicion, though no felony was, in fact, committed. A private person cannot justify unless there has been a felony committed.[3] If he should kill the suspected

[1] 2 Hale, P.C. 117; 1 East, P.C. 302. [2] Foster, Cr. L. 271.

[3] *Samuel* v. *Payne*, 1 Dougl. 359; *per* Lord Tenterden, *Beckwith* v. *Philby*, 6 B. & C. 637; *Davis* v. *Russell*, 5 Bing. 344.

person in attempting to effect his arrest, he will not be able to justify his act, even though a felony had been committed, if the person killed was really innocent.[1]

§ 151. As regards misdemeanours, no private person has a right to give another in charge to a police constable on suspicion, and there is no difference in this respect between one misdemeanour and another, as, for instance, between a breach of the peace and a fraud.[2] A private person may interfere when a breach of the peace or an affray is actually going on to stop it, or to prevent a renewal of it; and he may detain the persons so engaged for the purpose of handing them over to a constable.[3] But a detention for any purpose beyond the prevention of the offence would appear to be unlawful, unless the constable has witnessed the breach of the peace. No constable can arrest without a warrant for an ordinary assault or breach of the peace which he has not witnessed, and therefore it cannot be lawful to detain a person charged with such an offence, for the purpose of inducing a constable to do an act beyond his authority.[4]

§ 152. Finally, it must be remembered that neither a constable nor a private person can justify for an arrest, nor for anything done under an arrest, unless the facts which justified his conduct were known to him at the time, and were therefore circumstances which rendered his action lawful, at the time it took place.[5] A constable found a man wrongfully carrying away wood from a copse, which in England was of itself only a misdemeanour. He called on him to stand, and on his running away fired at and wounded him. For this offence the constable was indicted. It turned out that the man had in fact been twice before summarily convicted, and therefore by a special statute his subsequent stealing the wood was felony. The constable would have been justified in firing at him to arrest him for a felony, but knew nothing of the previous convictions at the time. It was laid down by Erle, J., that neither the belief of the prisoner that it was his duty to fire, nor the alleged felony, it being unknown to him at the time, constituted a justification for the wounding. This ruling was supported on reference to the Court of Appeal.[6]

[1] 2 Hale, P.C. 83; Foster, Cr. L. 318; 1 East, P.C. 300.
[2] *Fox* v. *Gaunt*, 3 B. & Ad. 798.
[3] *Timothy* v. *Simpson*, 1 C.M. & R. 757, at p. 762.
[4] 2 Hawk. P.C. 129; *Reg.* v. *Curran*, 1 Moo. C.C. 132.
[5] 2 Hawk. P.C. 120.
[6] *Reg.* v. *Dadson*, 2 Den. C.C. 35, affd. 20 L.J. M.C. 57.

§ 153. *Second.* — **Acts done under civil process** always require a special writ, and can only be done by those who are authorized by the writ, and in the manner which it permits. Under the Civil Procedure Code of 1882, s. 271 provides that—

"No person executing any process under this Code, directing or authorizing seizure of movable property, shall enter any dwelling-house after sunset or before sunrise, or shall break open any outer door of a dwelling-house. But when any such person has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe any such property to be. Provided, that if the room be in the actual occupancy of a woman, who according to the custom of the country does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw; and after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the time every precaution, consistent with these provisions, to prevent its clandestine removal."

Section 336 provides that a judgment debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable be brought before the Court. The section contains provisions identical with those of s. 271, as to the mode of entrance into the house, and as to the case of secluded women, not being the judgment debtors.[1]

§ 154. The provisions in these sections as to breaking open doors are evidently founded upon the English law.[2] The Code speaks of unfastening and opening inner doors. This, I presume, includes breaking open such doors, when locked and fastened. This is the English law, and was assumed to be so in India by Westropp, C.J.[3] The privilege of outer doors extends not only to a man's dwelling-house, but to an outhouse or other office attached to a dwelling, but not to shops, godowns, or storehouses, used not for dwelling but as receptacles for property.[4] Under English

[1] See as to the arrest of *Purdanashin* ladies, *Kadumbini Dossee* v. *Koylash Kamini Dossee*, 7 Cal. 19.

[2] See as to it *Semayne's* case, 5 Rep. 91; 1 Sm. L.C. (8th ed.) 115; *Anderson* v. *McQueen*, 7 Suth. Cr. 12.

[3] *Bai Kuvar* v. *Venidas*, 8 Bom. H.C. 127, p. 129.

[4] *Bai Kuvar* v. *Venidas*, *ub. sup.*; *Sodamini Dasi* v. *Jageswar*, 5 B. & K., App. 27; S.C. 13 Suth. 339; *Damoda Parsotam* v. *Ishvar Jetha*, 3 Bom. 89.

law the privilege of the dwelling-house only applies to the owner and his family, and their goods. If a stranger takes refuge there, or places his goods there to secure them from seizure, the sheriff may, after demand and refusal of admission, break the outer door to effect an arrest or seizure.[1] He does so, however, at his peril. He cannot justify the breaking upon mere suspicion if he does not find what he looked for.[2] Although a sheriff cannot break the outer door originally, if he has once effected a legal entrance, and is afterwards turned out by force, he may then break open the door to renew the execution, for the debtor cannot by his own illegal act put himself in a better position than he was in before; and no demand of admission is necessary, where it appears that the inmates of the house know the sheriff's purpose, and are determined to resist it.[3] So, where the sheriff has once got into the house, he may break out of it, if his exit is opposed.[4] It is lawful to effect a distress, and, I presume, to execute any other civil process, by climbing over a wall in a garden, and then passing through an open window, but not through one which is shut though not fastened.[5] "The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed, but that in the case of a window, entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened."[6]

In the fourth resolution in *Semayne's* case, it is said that though the sheriff is a trespasser by the breaking, yet the execution he does within the house is good.

Arrests on civil process on Sunday are not illegal in India.[7]

By English law the sheriff may open the outer door of a house, where the decree is for possession of it.[8] This seems in accordance with the Civ. P.C., s. 263, and is of course not affected by anything in ss. 271 and 336 already referred to.

[1] *Semayne's* case, fourth resolution.

[2] *Johnson* v. *Leigh*, 6 Taunt. 246; folld. *Reg.* v. *Gazi Aba*, 7 Bom. H.C. C.C. 83.

[3] *Aga Kurboolie Mahomed* v. *Reg.*, 4 Moo. P.C. 239.

[4] 2 Hawk. P.C. 137.

[5] *Long* v. *Clarke* (1894), 1 Q.B. 119.

[6] *Per* Manisty, J., *Crabtree* v. *Robinson*, 15 Q.B.D., p. 314.

[7] 4 Mad. H.C. Rulings, 62; *Param Shook* v. *Rasheed-ood-Dowlah*, 7 Mad. H.C. 285. Same rule as to arrest in Criminal case, *Abraham* v. *Reg.* 1 B.L.R. A. Cr. 17.

[8] *Semayne's* case, second resolution, 5 Rep. 91; Sm. L.C. (8th ed.) 115.

§ 155. **Defence to Criminal Charge.**—Where a civil suit is brought against a person who professes to be acting in execution of the law, he must show that he was absolutely justified in what he did. If he fails to do so, he has no defence to the action. But where a criminal charge is brought against him, the case is different. He may be civilly liable where he is not criminally responsible. For instance, a bailiff who arrests the wrong man would have no defence to an action for assault and imprisonment. But if he were indicted, he would be allowed under s. 76 to show that he made a mistake. Where, however, he made no mistake, but simply did what he had no right to do, wantonly or from ignorance of law, he would be responsible criminally.[1] Again, if a bailiff breaks open an outer door improperly, he would have no defence to a civil action for the trespass. But if he were charged with mischief under s. 425, it would probably be a good defence to show that he was acting mistakenly in what he supposed to be his duty, and that he had not the intent or knowledge which is an essential in the definition of mischief (*ante*, § 9). So if a policeman killed a criminal whom he was trying to arrest, he would have a good defence under s. 100, if he showed that his own life or limb was in danger from the resistance of the criminal. He would have no defence if he alleged that he could not otherwise have prevented the criminal's escape, the charge against him not being one punishable with death or imprisonment for life.[2] The cases of greatest difficulty would arise where the officer acted honestly under an order of a court which had no jurisdiction to issue the order, or which had jurisdiction, but which framed its order in such an erroneous manner that it was void. As to the first case, if the court had not, and could not have had, jurisdiction in the matter, the defence of the accused must rest upon his believing in good faith that it had jurisdiction (s. 78). The possibility of such a belief would depend upon the position of the ministerial officer who carried out the order (*ante*, § 138). Such a plea would relieve him from criminal responsibility, but not from civil liability. Where, however, the court might have had jurisdiction to pass the order, though, in fact, it had not, the officer is bound to execute the order, and is protected equally from suit and

[1] *Thakurdoss* v. *Shunkur Roy*, 3 Suth. Cr. 53.
[2] *Reg.* v. *Dudson*, 2 Den. C.C. 35; *ante*, § 146.

prosecution.[1] On the other hand, where the order was one which the court had perfect authority to issue, and was one which the police officers were in the habit of executing, the mere form of the warrant, especially in India, and with the class of persons who are employed on such duties, might fairly be taken on trust by those to whom it was handed for execution. The Commissioners in s. 31 of the Draft Code of 1878 lay down the following rule on this point, which seems such as might well be adopted in India. It leaves the question of civil liability untouched.

"Every one acting under a warrant or process which is bad in law, on account of some defect in substance or in form apparent on the face of it, if he in good faith, and without culpable ignorance or negligence, believed that the warrant or process was good in law, shall be protected from criminal responsibility to the same extent, and subject to the same provisions, as if the warrant or process was good in law, and ignorance of the law shall in this case be an excuse. Provided that it shall be a question of law, whether the facts of which there is evidence may, or may not, constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law."

§ 156. **Accident**[2] is not of itself a defence to a civil suit unless the injury complained of was due to some overpowering or intervening agency, such as a runaway horse,[3] or a tree in the line of fire, which causes the shot to glance off,[4] in which case it is not the defendant's act at all; or is caused wholly by something done by the plaintiff, such as suddenly placing himself in front of a horse, or of a gun which was about to be fired,[5] in which case it was his act. "If in the dark I ignorantly ride against another man on horseback, this is undoubtedly trespass, though I was not aware of his presence until we came in contact."[6] But in criminal law it is different. An injury to another, which is wholly unforeseen and unintended, is not criminally punishable, unless there is something unlawful in the act itself, or in the mode of doing it. For instance, if a man aims a blow

[1] 1 Hale, P.C. 498; *Countess of Rutland's* case, 6 Rep. 52*a*; *ante*, § 138.
[2] I.P.C, s. 80.
[3] *Holmes* v. *Mather*, L.R. 10 Ex. 261.
[4] *Stanley* v. *Powell* (1891), 1 Q.B. 86.
[5] 1 Hale, P.C. 476; *Weaver* v. *Ward*, 1 Hob. 134; *Wakeman* v. *Robinson*, 1 Bing. 213.
[6] *Per* Ld. Ellenborough, C.J., *Covell* v. *Laming*, 1 Camp. 497.

at or leaves poison for another, and the blow or the poison takes effect upon the man's dearest friend, this, in one sense, is an accident, but in law it is treated exactly as if the real sufferer had been the one for whom the harm was intended.[1] So where a person threw large stones down a mine, by means of which he broke the scaffolding, and caused a miner, who was afterwards descending, to fall down the mine, and to be killed, Tindal, C.J., said, "If death ensues as the consequence of a wrongful act—an act which the party who commits it can neither justify nor excuse—it is not accidental death, but manslaughter." "In the present instance the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question, therefore, is whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."[2]

§ 157. Where the injury is purely accidental, but results from doing an act which is not *malum in se*, but *malum prohibitum*, as being forbidden by statute under a penalty, it is stated by some of the highest authorities that this illegality does not render the accidental act criminal.[3] Sir James Stephen says he thinks this distinction can no longer be regarded as law.[4] Probably the decision would depend upon the further question, whether the harm resulting from the accident was the sort of harm the statute had intended to prevent. Suppose, for instance, that a statute forbade under a penalty the sale of poisons, except in coloured and ribbed bottles, and that a chemist sold laudanum in a plain bottle, and that in consequence it was swallowed by accident as a harmless draught. There his act was perfectly innocent before the statute, but, from disregard of its provisions, the very death which the statute intended to prevent, naturally resulted. I think he would certainly not be protected by s. 80. The case put by Lord Hale is that of a man who accidentally kills another, while he is shooting without a game licence. Here it is evident the statute was intended to protect the Queen's Revenue, and not her subjects. On the same principle it has been frequently decided, that where a statute directs, or forbids, a particular act, in order

[1] Foster, C.L. 261.
[2] *Fenton's* case, 1 Lewin, 179.
[3] 1 Hale, P.C. 475; Foster, Cr. L. 259; 1 East, P.C. 260.

to secure some special purpose, no action can be brought for the breach of it, by a person who has been injured in a way which the statute never contemplated.[1]

§ 158. The second class of cases, where an otherwise innocent act becomes criminal, from being done without proper care and caution, may be illustrated by the familiar case of accidents with horses or firearms. If a person rides or drives carelessly, or urges his horse to an improper speed, and thereby runs over one, whom he could otherwise have avoided, this is not an accident,[2] and it makes no difference that the sufferer was deaf, and therefore did not get out of the way, as it might have been expected he would have done.[3] Even where horses have run away with a carriage, if they have got out of control from being improperly excited, as where two rival omnibuses were racing with each other, the injury resulting will be referred to the misconduct which brought it about, and will not be excused by the fact that, at the moment when it occurred, the driver could not have prevented it.[4] So with firearms. A couple of volunteers took to practising at a mark in a field near roads and houses. One of them shot a boy who was in a tree in a garden 393 yards off. The rifle was sighted for 900 yards, and was deadly at a mile. The act was held to be manslaughter.[5] If, however, a man is shooting with due care and caution, and the bullet or shot glances off a tree and kills a bystander, this is excused, as the accident could not have been foreseen or guarded against.[6] So as regards that dangerous practice of pointing firearms at another. If a person points a gun at another, and it goes off, either by his pulling the trigger, or by careless handling, if he has taken no proper precautions to ascertain whether it was loaded or not, any injury that may follow is inexcusable. On the other hand, a man brought home a loaded gun and fired it off. In the evening he took it up, touched the trigger, and it went off and killed his wife. It turned out that in his absence a friend had taken out the gun, and brought it back loaded, and left it in that state. He was tried before Mr. Justice Foster, who directed an acquittal.[7] In such a case, the person who left the gun loaded would not be criminally liable, because the act of firing was not his,[8] though civilly

[1] *Gorris* v. *Scott*, L.R. 9 Ex. 125; *Ward* v. *Hobbs*, 4 App. Ca. 13.
[2] 1 Hale, P.C. 476.
[3] *Reg.* v. *Longbottom*, 3 Cox. CC. 439.
[4] *Reg.* v. *Timmins*, 7 C. & P. 499.
[5] *Reg.* v. *Salmon*, 6 Q.B.D. 79.
[6] 1 Hale, P.C. 475.
[7] Foster, Cr. L. 265.
[8] 1 East, P.C. 265.

he might have been made responsible, if dangerous consequences were likely to follow.[1] In one case of this sort, a man picked up a pistol in the street, tried it with a rammer and found no charge. The rammer, in fact, was too short. He then aimed it at his wife, drew the trigger and killed her. He was convicted of manslaughter.[2] The propriety of this ruling was doubted at the time by Holt, C.J., and afterwards by Mr. Justice Foster. He says that in his opinion the judgment was not strictly legal, "for the law in these cases doth not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken."[3]

§ 159. **Choice of Evils.**—Section 81 is intended to give legislative sanction to the principle, that where, on a sudden and extreme emergency, one or other of two evils is inevitable, it is lawful so to direct events that the smaller only shall occur. The doctrine was laid down by Lord Mansfield, on the trial in England of the Member of Council who had imprisoned and deposed Lord Pigot, Governor of Madras, on the allegation that, by his arbitrary and unconstitutional proceedings, he had brought public business to a standstill. He said, "In England it cannot happen, but in India you may suppose a possible case; but in that case it must be imminent, extreme necessity. There must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme; and in the whole they do, they must appear clearly to do it with a view to preserve the society and themselves—with a view of preserving the whole."[4] The prisoners were all found guilty. Lord Hale observes that, "By the Rhodian law and the common maritime custom, if the common provisions for the ship's company fail, the master may, under certain temperaments, break open the private chests of the mariners and passengers, and make a distribution of that particular and private provision for the preservation of the ship's company."[5]

§ 160. Nothing in the language of Lord Hale or Lord Mansfield, or in the illustrations to s. 81, can lend any colour to the suggestion that a man can ever be protected by this section, where he injures another to secure some personal benefit to himself. The English jurists are all

[1] *Dixon* v. *Bell*, 5 M. & S. 198. [2] *Rampton's* case, Kel. 41.
[3] Foster, Cr. L. 264; 1 East, P.C. 266.
[4] *R.* v. *Stratton*, 21 St. Tr. 1046, at p. 1224. [5] 1 Hale, P.C. 55.

agreed that no amount of necessity will justify a man in stealing clothes or food, however much his wants may go in mitigation of his punishment.[1] The rule of Scotch law is the same.[2] And so the framers of the Penal Code say:[3]

"Nothing is more usual than for thieves to urge distress and hunger as excuse for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not deter him from committing theft. Yet it by no means follows that it is irrational to punish him for theft. For though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft. But it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft."

So where a person placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief, who was in the habit of stealing his toddy, and the toddy was drunk by, and injured, some soldiers who purchased it from an unknown vendor, it was held that he was rightly convicted under s. 328, and that s. 81 was no defence.[4]

§ 161. In an American case,[5] shipwrecked passengers and sailors were trying to escape in a boat which could not hold all, whereupon the sailors threw some of the passengers overboard. Upon the trial, Baldwin, J., laid down as propositions of law, that in a struggle for existence between passengers and crew, the crew were entitled to the preference so far as was necessary for purposes of navigation, but that beyond this *quota* the crew were bound to sacrifice themselves for the passengers. As to the mode of selecting victims from either class, he stated that the proper method

[1] 1 Hale, 54; 2 East P.C. 698. [2] Alison, Crim. L. 674.
[3] Note B., p. 113. [4] *Reg.* v. *Dhania*, 5 Bom. H.C. C.C. 59.
[5] *Commonwealth* v. *Holms*, cited, Wharton, Homicide, 237.

was by lot, and that while, in a case of necessity, all were entitled to resort to this mode of arbitrament, those to whom it was unfavourable were bound to submit. It is to be feared that, in a case of emergency, the stronger would hardly pay much attention to this decision, supposing it be sound in law, which is more than doubtful.

The only instance in which the above appear to have come before an English court in require a decision, is the recent case of *Reg.* There four shipwrecked sailors in a boat verge of starvation. Two of the four kille the three drank his blood. They were picked afterwards. The jury found a special verdict—

"That if the men had not fed upon the body of they would probably not have survived to be so and rescued, but would, within the four days, have died famine. That the boy, being in a much weaker condition was likely to have died before them. That at the time of the act in question, there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men."

Upon these facts the court found the offence to be technically murder. The only English authority cited to the contrary was that of Lord Bacon, who says in his maxims, that necessity carries a privilege in itself, and that one sort of necessity is for the conservation of life, in regard to which he asserts that a man who steals to satisfy his hunger is not guilty of larceny, and that men in danger of drowning who have got upon a plank or boat may lawfully thrust away another to save their own life. The judges denied that the former illustration was good law, and said that although there were many conceivable state of things in which the latter might possibly be true, it could not support the broad proposition, that a man could save his own life by killing an innocent and unoffending neighbour. The necessity which justifies taking the life of another is either

[1] 14 Q.B.D. 273.

physical, legal, or moral. The two former sorts were out of the question, and a man can never be under a moral obligation to save his own life at the expense of an unoffending person, though he may frequently be under exactly an opposite obligation.

§ 162. **Infancy.**—Sections 82 and 83 leave the law very much as it is in England and Scotland in case of felonies, but they admit of none of the distinctions which have been raised by English lawyers, where the offences charged were misdemeanours, or arose out of omissions to discharge obligations attaching upon property, or depended upon a command, or upon an assent to commit a misdemeanour, which an infant was supposed incapable of giving before full age.[1] Under the Code there is an absolute incapacity for crime before seven, and a complete liability to punishment after twelve. In the intermediate period, criminal responsibility depends upon the state of the mind. Nothing is said in the Code, however, upon the presumption which is to be drawn, in the absence of all evidence, as to whether a child in this transition stage is of sufficient maturity to be called to account for its actions or not. Possibly this was passed over as being a matter of evidence. The Commissioners, however, in their first report, 1846, s. 117, p. 220, say in reference to this section: "It would seem from this that *maturity of understanding is to be presumed* in case of such a child unless the negative be proved on the defence." It is difficult to see why there should be any presumption that a child who, only a week ago, was absolutely exempt from punishment on the score of immaturity, should be presumed, after seven days have elapsed, to be of mature mind. It is also difficult to see how the negative could possibly be proved, in the case of any child above seven. According to English law, during this second period, "An infant shall be *primâ facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction."[2]

In a Bengal case, the High Court felt itself obliged, upon the facts of the case showing premeditation, contrivance,

[1] 1 Hale, P.C. 20—22; 1 Hawk, P.C. 503.
[2] 1 Russ. 109; Steph. Dig. Cr. L., art. 26.

and full knowledge of the nature of the act, to convict of murder, and to sentence to transportation for life, a girl of ten years, who had killed her husband. They forwarded the case, however, to the Lieutenant-Governor with a recommendation that he would reduce the punishment to seven years' imprisonment in a reformatory.[1]

Under the Crim. P. C., s. 399, where any person under sixteen shall be sentenced to imprisonment for any offence, the court passing the sentence is authorized to direct the confinement of the offender in a reformatory recognized by Government, instead of consigning him to jail.

§ 163. **Insanity** (I.P.C., s. 84). — Probably there is no branch of criminal law in respect to which public opinion has undergone a greater change, than that which professes to define the criminal responsibility of lunatics. It has been long since established that madness is merely a disease, like paralysis or epilepsy. Like them it may be brought on by the vicious habits of the sufferer, or may arise from causes for which he is no way to blame. Whatever may be its origin, when it is once established, the victim may struggle against it, but he can no more escape from the malady itself or its consequences than he can from cholera or small-pox. A feeling has grown up, that every act committed by a madman partakes of the character of inevitable helplessness which attaches to his disease, and that it is as unjust to punish him for a result of his disease as for the disease itself. Many go even further, and assume, from the inexplicable character of a crime, the existence of a madness of which the crime itself is the only evidence; the stereotyped verdict of a coroner's jury, "that the deceased committed suicide while in a state of temporary insanity," is merely an expression of the popular opinion, that a person who has committed a crime for which a sensible man cannot account, must have been mad to do it. Hence, in a very appreciable number of cases of murder, insanity is set up as a defence. Witnesses are called to prove facts evidencing every mental phase from oddity to madness, and every ailment from sunstroke to epilepsy, which might lead to insanity. Doctors are called to assert that these facts lead to the proposition that the prisoner was mad when he committed the innocent A suppressed premise is assumed, that if he with justifies was not responsible for his acts. The judge

[1] *v. Mt. Aimona*, 1 Suth. Cr. 43.

supplies this premise, and tells the jury that madness is no defence, if the prisoner in fact knew that he was committing a punishable act. The jury look at the puzzled and stupid, or irritable and excited, object in the dock, and wonder what he really had been thinking of when he killed the deceased. If they convict, the doctors say it is a sin to hang a man for what he did when he was mad. If they acquit, the lawyers say it is a sin not to hang a man who knew perfectly what he was about.

§ 164. In England, as Sir James Stephen points out,[1] where every prisoner is tried by a jury, these differences of view do no substantial harm. The juries do not trouble themselves about refined reasonings. If they think the crime was one which no one but a madman would have committed, they acquit on the ground of insanity. If they think it was the crime of a very wicked but sane man, they convict. They give no reasons for their verdict, and no appeal lies against it. If the conviction is open to doubt, the Home Secretary sets aside the capital sentence. If they take too merciful a view, the man is in any case shut up for life, and no great harm is done. In India, however, it is different. If the trial takes place in the mofussil, the judge has to give his reasons, and his sentence is subject to confirmation, appeal, or review. The High Court again gives its reasons, and its decision forms a precedent to which future judges try to conform. It is, therefore, most important that the theory of criminal responsibility should be thoroughly understood by those who practise in, and preside over, criminal courts. Perhaps the most valuable portion of Sir James Stephen's great work on criminal law is the chapter (vol. ii. chap. xix.) in which, with an equally profound knowledge of the conflicting theories of the lawyer and the doctor, he weighs and balances each against the other, and evokes common sense out of contradiction. Even where I do not specifically refer to Sir James Stephen's work, I must be understood as acknowledging a continuous obligation to it during the ensuing remarks.

§ 165. It is hardly necessary to say that in India the limits of criminal responsibility must be sought for in the sections of the Penal Code alone, and in such inferences as may be legitimately drawn from them. A prisoner who claims exemption on the ground of insanity, must show that

[1] 2 Steph. Crim. L. 186.

"at the time of doing the act, he was by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law."[1] The Legislature might have given him much greater indulgence, and would have done so if they had passed in 1837 the Code which was then drafted by Mr. Macaulay and his colleagues. The sections relating to insanity in that Code were the following:—

66. Nothing is an offence which is done by a person in a state of idiocy.

67. Nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it.

§ 166. It is clear that s. 67 would grant to a lunatic an immunity extending as far as anything claimed by medical theorists. It is also clear that the framers of the Code of 1837 imagined they were laying down a self-evident proposition, which they apparently assumed to be a plain statement of the English law. They did not notice s. 67 in their very elaborate notes on the Code, though they entered into a lengthened defence of ss. 69 and 70 (87 and 88 of the present Code), and no one of the numerous authorities to whom the draft was referred for criticism commented upon the principle so laid down. In 1837 the law on the criminal responsibility of lunatics, though it had been laid down in substantial conformity with the doctrine of the Penal Code in several cases, particularly in *Bowler's* case, by Le Blanc, J., and in *Bellingham's* case, by Mansfield, C.J.,[2] had not yet received the thorough examination of more recent times. The treatises on criminal law used terms either misleading or vague. Hale says he can think of no better test, than that a person labouring under melancholy distempers, who has ordinarily as great understanding as a child of fourteen years of age may be guilty.[3] This is obviously too favourable to the offender. Hawkins extends exemption to "those who are under a natural disability of distinguishing between good and evil."[4] This again is an inaccurate test, as many a lunatic is quite aware that he is committing an act for which he will be punished, if found out, though it seems to him a perfectly good and proper thing to do. This test, of a capacity to distinguish between

[1] *Reg.* v. *Rasai Mia*, 22 Cal. 817.
[2] 1 Russ. Crim. 118.
[3] 1 Hale, P.C. 30.
[4] 1 Hawk. P.C. 1.

moral good and evil, appears to have been adopted by Tracy, J., in charging the jury in the case of *Reg.* v. *Arnold*, in 1724,[1] and to a certain extent by the Solicitor-General in 1760, in his speech for the prosecution in *Reg.* v. *Ferrers*.[2] In the case of *Reg.* v. *Hadfield*, in 1800, Erskine, in his celebrated speech for the defence, said to the jury,[3] "I must convince you, not only that the prisoner was a lunatic, but that the act in question was the immediate and unqualified offspring of the disease." This might probably be affirmed of every criminal act committed by a lunatic. It means nothing more than that his lunacy supplied the motive upon which he acted, just as jealousy or revenge supplies a motive to a man who is sane. It would almost seem, however, as if Erskine's proposition had been accepted by the Law Commissioners, and embodied in the draft Code of 1837.

§ 167. The legal doctrine in regard to criminal insanity was for the first time settled in England after the trial of McNaghten, for the murder of Mr. Drummond, in 1843. The case is very fully reported in the Annual Register for 1843, p. 344, and also in 4 St. Tr. N.S. 847. It appeared from the evidence for the defence that McNaghten had for many years suffered from what is known to doctors as "persecution mania." He thought that he was dogged by a gang of persons, who followed him about, and slandered him, and prevented him getting situations. After the murder he told the doctor who was in charge of him, that "he imagined the person whom he shot at Charing Cross to be one of the crew, a part of the system that was destroying his health; when he saw the person at Charing Cross at whom he fired, every feeling of suffering which he had endured for months and years, rose up at once in his mind, and he conceived that he should obtain peace by killing him." There seems to be no doubt that he really did suffer from these delusions. The suggestion that he had some fancied grievance against Sir Robert Peel, and that he shot Mr. Drummond, mistaking him for the Prime Minister, appears to be without foundation.

The case was stopped by the judge upon the medical evidence, especially upon the testimony of the last two witnesses, one of whom stated that in his opinion the

[1] 16 St. Tr., p. 764. [2] 19 St. Tr., p. 947.
[3] 27 St. Tr., p. 1308.

prisoner was at the time of the act impelled by an uncontrollable impulse, while the other merely stated that he was undoubtedly insane at that time. Some of the witnesses admitted that many lunatics were aware of the difference between right and wrong. Very little cross-examination was directed to that point, and none as to the possibility that a lunatic, while thinking that he was doing a right act, might be aware that he would be punished for it. The Solicitor-General, Sir W. Follett, when yielding to the opinion of the Bench, said, in his final address to the jury, that the object of the Crown had been "to ascertain whether at the time the prisoner committed the crime, he was at that time to be regarded as a responsible agent, or whether all control of himself was taken away." Tindal, C.J., in charging the jury,[1] said nothing about uncontrollable impulse. He asked them, "Whether you are satisfied that at the time the act was committed, the prisoner had that competent use of his understanding, as that he knew that he was doing by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God *or* of man,[2] undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act." The jury acquitted the prisoner on the ground of insanity.

§ 168. This trial and its result appear to have caused considerable sensation, and the House of Lords called on the fifteen judges to lay down the law on the subject of criminal responsibility in cases of alleged lunacy, in answer to questions propounded to them. This course appears to have been taken with a view to some legislation which was then contemplated. Fourteen of the judges united in their answers. Maule, J., returned separate answers, which did not materially differ from those of his colleagues. The questions and answers are as follow:—[3]

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime,

[1] 4 St. Tr. N.S., p. 926.

[2] The report given in 10 Cl. & F., p. 200, uses the words, "that he was violating the laws *both* of God and man," which is something very different. The report in the State Trials agrees in this respect with the very full report in the Annual Register, and is no doubt correct.

[3] 12 Cl. & Fin. 200; 4 St. Tri. N.S. 926.

the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?

"2nd. What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

"3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4th. If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to the law, or whether he was labouring under and what delusion at the time?"

To the first question:—"Assuming that your Lordships' inquires are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

To the second and third questions:—"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the

mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course. we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require."

To the fourth question:—"The answer to this question must, of course, depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased has inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the last question:—"We think the medical man, under the circumstances supposed, cannot in strictness be

asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

§ 169. The mode by which these opinions were elicited was certainly anomalous, as no judicial proceeding was pending in reference to the questions asked. The result, as Sir James Stephen points out, was that the answers themselves were unsatisfactory. They were not given after formal argument. They contained no examination of the previous current of authorities and decisions. What was most important, they were not given with regard to any state of facts, real or assumed, which would have enabled the judges to point out how their rules would apply to such concrete instances as, for example, those of *McNaghten* himself or of *Hadfield*. Still the opinions themselves are of the highest possible weight, being given by fourteen of the most experienced judges, after anxious deliberation, and no doubt after the fullest consideration of everything that had been written or decided upon the point in England. In every subsequent case in England these opinions have been followed, as the most authoritative expression of the law upon the subject. What is most important for our purposes is, that they were apparently adopted by the Legislature of India. Act IV. of 1849, s. 1, provides that "no person can be acquitted for unsoundness of mind, unless it can be proved that, by reason of unsoundness of mind, not wilfully caused by himself, he was unconscious and incapable of knowing, in doing the act, that he was doing an act forbidden by the law of the land." The Indian Penal Code substantially follows the same rule. It lays down two tests of criminal responsibility: First, did the offender know the nature of the act? Second, did he know that it was either wrong or contrary to law?

§ 170. Sir James Stephen is of opinion [1] that these tests are not exhaustive, and that there is a third ground of

[1] 2 Crim. L., 177.

instantly inflicted." On this they remark, "the test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred, or ungovernable passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy those requisites, and obviate the risk of a jury being misled by considerations of so metaphysical a character."

§ 171. It is certainly conceivable that there might be a state of mental disease, which would deprive the sufferer of all capacity to resist a particular impulse, while it left him the perception of the nature and consequences of the act to which he was impelled. The insuperable difficulty in the way of giving legal effect to such a defence would be, that it would be impossible to establish it. We can tell that a man has not resisted an impulse, but how can we tell that he could not have resisted it, or why he could not? It is a matter of everyday experience that persons who are subject to no mental disease, yield to apparently uncontrollable fits of passion, and commit crimes for which they are hung. It may be that they could not control their passion, but we hang them all the more on that account. If a man who is mentally diseased acts in a similar way, how are we to know that his want of control is due to his mental disease, or that his mental disease did more than supply him with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen? Even in a lunatic asylum some sort of discipline is maintained, by pains and discomforts inflicted upon the patients, and they learn to exercise some self-restraint in order to avoid the infliction.[1] If a case arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code. If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the Executive, not by the exempting power of the judge.[2]

§ 172. The Penal Code contemplates, as grounds of exemption from criminal responsibility, two completely different mental conditions arising from unsoundness of

[1] 2 Steph. Crim. L. 181.

[2] See the remarks of Sir James Stephen on the medical evidence in *Dove's* case, 3 Steph. Crim. L., pp. 429—437.

mind, viz. an incapacity (1) to know the nature of the act; (2) to know that he is doing what is either wrong or contrary to law. Of these, the first seems to refer to the offender's consciousness of the bearing of his act on those who are affected by it; the second, to his consciousness of its relation to himself. Each species of consciousness is ordinarily present to the mind of a normally sane person. Either, or both, or neither may be absent from the mind of one who is mentally diseased. The absence of both or either relieves the offender from liability to punishment.

The question of criminal insanity practically only arises in cases of homicide. In other cases, a successful plea of insanity would entail upon the prisoner a penalty worse than that resulting from conviction. Even in England, where *kleptomania* is sometimes set up on behalf of respectable thieves, it is rather addressed to the clemency of the judge than to the verdict of the jury. The ensuing remarks will refer exclusively to cases of homicide.

§ 173. *First.*—The words "incapable of knowing the *nature* of the act" may refer to two different states of mind, which are distinguished in the answers of the judges, and in the English Draft Code of 1879, by the words *nature and quality.* A man is properly said to be ignorant of the nature of his act, when he is ignorant of the properties and operation of the external agencies which he brings into play. As if, for instance, an idiot should fire a gun at a person, looking upon it as a harmless firework. He is ignorant of the quality of his act if he knows the result which will follow, but is incapable of appreciating the elementary principles which make up the heinous and shocking nature of that result; as if, for instance, an idiot was unable to perceive the difference between shooting a man and shooting an ape. Both of these states of mind are no doubt intended by the authors of the Penal Code to be included under the words they have used.

This ground of exemption will hardly ever be found to exist, except in the case of idiots, or of lunatics whose insanity is so complete as to sweep away substantially all the reasoning power which distinguishes a man from a beast. But it seems to me most important to point out, that a person in this condition might have that consciousness, which is equally possessed by the lower animals, that the act which he intended to do was wrong in the sense of being forbidden, and one for which he might be punished. This,

however, would not render him liable under the words of the second clause, if he was incapable of knowing the nature of the act which he really did, and for which alone he could be indicted. A good illustration is to be found in the case, mentioned by Sir James Stephen, of the idiot who cut off the head of a man whom he found sleeping, because, as he explained, it would be such fun to watch him looking about for his head when he awoke. It is probable that the idiot was quite aware that the man was entitled to the possession of his head, and expected that, if he was detected, he would be well cuffed by the man, and very probably taken up by the police. It is quite certain he had no idea that his fun would be lost, because the man would never awake.

§ 174. *Second.*—The next ground of exemption is the most important, as it is generally the test in the very numerous cases, where mental disease has only partially extinguished reason. One familiar instance of such partial extinction is the case of delusions, which, apparently, leave the mind unaltered outside the special ideas which they affect. The questions put by the House of Lords to the judges seem to have been specially addressed to this form of insanity. Their answers are perfectly clear, and are embodied in the following clause of the Draft Code of 1879, which puts the law in the most satisfactory manner.

"A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act. Provided that insanity before or after the time he committed the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he committed the act, in such a condition of mind as to entitle him to be acquitted on the ground of insanity."

§ 175. In *Reg.* v. *Townley*,[1] Martin, B., put, as an instance of a delusion, the case of a man who fancied himself to be a king dispensing justice to his subjects. "If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible." In a case which occurred in the Madras Presidency, an official travelling by night in a district which

[1] 3 F. & F. 839.

had been disturbed, shot a moonsiff who came to greet him when he was changing his bearers, under the belief that the moonsiff was the head of a gang of rebels. If this was an insane delusion, he would have been entitled to acquittal on the ground of insanity. If there was nothing in *McNaghten's* case except his delusion, it certainly did not justify his acquittal. Shooting Mr. Drummond, even if it had been true that he was one of a set of people who had been persecuting him, was rank murder. The mere existence of an insane delusion only entitles a man to be treated as if the facts really were such as he supposed them to be.

§ 176. It is common to speak of persons subject to insane delusions as being in other respects sane, and the term *monomania* is founded on the assumption that the mania is confined to a single point. Medical science, however, has established that such a conception is incorrect. Insane delusions, as distinguished from delusions arising from a disordered state of the senses, spring from a diseased state of the brain. The delusion is the outward and visible sign of the disease; but the disease itself must have preceded the delusion, and continues silently to vitiate the mind, sapping the reason, warping the intelligence, and perverting the emotions. The disease may break out at any moment in a fresh direction, and with new symptoms.[1] A man who imagines himself a teapot, may, apparently, be the victim of a perfectly harmless fancy. But it is obvious that such a notion cannot continue, unless his powers of observation, comparison, and inference are completely undermined. Where the existence of insane delusions is established, and especially where it is shown that they led to the offence, the facts are very valuable, as evidencing the prisoner's state of mind at the time of the offence. It must not, however, be assumed that he did, or could have contemplated the surrounding facts with the same unclouded mind as an ordinarily sane person.

This consideration is most important when we are arriving at an opinion whether the prisoner did the act, knowing or not knowing the matters on which his responsibility depends. In *Reg.* v. *Layton*,[2] Rolfe, B., said: "Perhaps it would be going too far to say that a party was

[1] 2 Steph. Crim. L., citing Griesinger, 307, 323; 2 Taylor, Med. Jur., 478.

[2] 4 Cox, C.C. 149.

responsible in every case, where he had a glimmering knowledge of what was right and wrong." When we talk of a man knowing that murder is wrong and contrary to law, we mean that the knowledge forms an essential part of the stock of principles which govern every moment of his life. That whenever he is tempted to commit a murder, his mind must necessarily at the same time contemplate the fact, that if he does commit it, he will probably be hung, and in any case his life will become a burthen to him, from the constant chance of his being found out. There is no ordinary murderer of whom this, at least, may not be stated with certainty. But can it be said of all lunatics? Of many, no doubt, it can, but certainly not of all. When we say of a lunatic that "his mind is unhinged," we use a phrase which seems to me to embody a very important truth. His mind is still there, but it is dislocated. The facts which make up his knowledge are still there, but they have ceased to be in connection with, or to bear upon, each other. They have passed from being principles of conduct to being barren pieces of information—such as the statement that we may each drop down dead at any moment—which every one believes, and by which no one is influenced.

§ 177. The case of *Rex* v. *Hadfield*[1] seems to me to be only explicable in this view. Hadfield was a sergeant of dragoons, who had received the most frightful wounds in his brain while defending in battle the life of his Commander-in-Chief, the Duke of York. His body was cured, but he became an outrageous lunatic. His latest delusion was that the world was coming to an end, and that he was commissioned by the Almighty to save mankind by the sacrifice of himself. As he did not wish to commit suicide, he hit upon the plan of doing some act for which he would be hung. On the morning of the offence he tried to kill his infant child, but was prevented. He then went to the Drury Lane Theatre, which was to be attended by the Royal Family, having concealed upon his person a horse pistol, loaded with slugs. As soon as the King entered his box, Hadfield stood up and fired at him. It is stated that a ball only missed him by about a yard. He was seized, and when the Duke of York came in he at once recognized him, showed his wounds, told how he had received them,

[1] 27 St. Tr. 1281; 2 Steph. Crim. L. 159.

and for a time talked in a perfectly sensible manner. He then relapsed into incoherence; talked of Divine commission and approaching martyrdom, and otherwise sank back into lunacy.

Hadfield was acquitted on the ground of insanity. What makes the case so strong is, that he was not acquitted by the jury under the influence of Erskine's eloquence, but that Lord Kenyon, C.J., who presided at the trial, assisted by three very able judges, Grose, Lawrence, and Le Blanc, stopped the case when Erskine had still twenty witnesses to call. He said:[1] "Mr. Attorney-General, can you call any witnesses to contradict these facts? With regard to the law as it has been laid down, there can be no doubt upon earth. To be sure if a man is in a deranged state of mind at the time he commits the act charged as criminal, he is not answerable. The material question is, whether at the very time when the act was committed the man's mind was sane? I confess that the facts proved convince my mind that at the time he committed the supposed offence (and had he then known what he was doing, a most horrid offence it was) he was in a very deranged state." The Attorney-General (Mitford, afterwards Lord Redesdale) admitted that he could not support the prosecution, and Lord Kenyon then said: "Gentlemen of the jury, the Attorney-General's opinion coinciding with mine, I believe it is necessary for me to submit to you, whether you will not find that the prisoner at the time he committed the act was not under the guidance of reason?" The jury accordingly returned a verdict of "Not guilty."

§ 178. Sir James Stephen remarks upon this trial:[2] "In this case Hadfield clearly knew the nature of his act, viz. that he was firing a loaded horse pistol at George III. He also knew the quality of the act, viz. that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by law), for the very object for which he did it was that he might be put to death, that so the world might be saved; and his reluctance to commit suicide showed that he had some moral sentiments. It would seem, therefore, that, if the answer given by the judges is not only true as far as it goes, but is also complete, so that no question can properly be left to the jury as to the effects of madness upon responsibility, other than

[1] 27 St. Tr. 1353. [2] 2 Crim. L. 159.

those which it states, Hadfield ought to have been convicted."

I think that Hadfield had no real idea of the quality of his act. He thought that he was taking the first and indispensable step towards effecting the salvation of the world, and that, even if he hit the King, which he probably did not intend, he would still be conferring on him a benefit infinitely transcending the possible harm he might inflict. His frame of mind was rather that of a fireman, who tears down a building to check the progress of a conflagration. If this is so, then his case came within the express words of the answer to the second and third questions, because the fact that he knew he was doing wrong only becomes material according to that answer, if he did know the nature and quality of his act. Nor do I think that his case came at all within the answer to the first question. That answer was expressly limited in its application "to those persons who labour under such partial delusions only, and are not in other respects insane." The analysis of madness with which Sir James Stephen follows up the remarks I have just quoted,[1] seems to me to prove conclusively that Hadfield's delusions, so persistent and violent as they were; delusions which were capable of converting an affectionate father and a loyal soldier into a murderer of his child and his King; established that his mind was in other respects completely and utterly insane, and that any "glimmering knowledge" he may have had of the nature and consequences of his act, was absolutely incapable of influencing, guiding, or controlling his conduct.

It may be material to remark that so high an authority as Lord Campbell, writing in 1857, long after *McNaghten's* case, says of *Hadfield's* trial,[2] "On this occasion Lord Kenyon conducted himself with great propriety, laying down the sound rule which ought to prevail where the defence to a criminal charge is insanity, and applying that rule with promptness and precision to the facts before him."

§ 179. It seems to me that the authors of the Penal Code have tried to embody in clause 84 the substance of the answer of the judges in *McNaghten's* case; that those answers attempted to define the minimum of sanity which is necessary for criminal responsibility where the offender is mentally

[1] 2 Steph. Crim. L., pp. 160—166.
[2] Lives of the Chief Justices, iii. 60.

diseased, but that they assume the existence of some margin of sanity, and have no application to the case of a person who is so completely insane at the time of the act as to be no longer a rational being. Such a complete absence of sanity was found to exist in *Hadfield's* case by Lord Kenyon, and in *McNaghten's* case by the jury, and fully explained the result arrived at in each instance.

§ 180. **Proof of Insanity.**—Where insanity is alleged on behalf of a prisoner, the burthen of proving such a degree of insanity as exempts him from punishment lies on the prisoner.[1] "A mere doubt as to his sanity is not sufficient. The jury must be satisfied by the prisoner, on whom the *onus* lies, that he was insane."[2] Where the offender has lucid intervals, Lord Hale says that the law will assume that the offence was committed in a lucid interval, unless the contrary is shown.[3] If, however, a fit of madness had existed only shortly before the act, the presumption of sanity would be greatly weakened, or might absolutely disappear.[4] It may be well to remark that a contrary rule prevails in testamentary cases, because the person who propounds a will undertakes to prove that the testator was of "sound and disposing mind."[5]

§ 181. The most valuable evidence in cases of alleged insanity is that of medical men, who have had the offender under treatment or observation before or immediately after the committal of the act. It is a useful caution which Dr. Chevers gives[6] "with regard to the necessity for reserve in attempting, previous to trial or examination by the magistrate, to cure or remove the causes of excitement, whether it be the result of drugging, cerebral disorder evidently depending upon organic causes, or acute mania." It is clearly essential that those who have to decide whether the prisoner at the time of the act was suffering from any, and what degree of, mental disease, should see him in the same state, as far as possible, as he was in when he committed the act, and not in a state brought about by medical cure. The medical evidence will be particularly valuable as showing whether the excitement, evidenced at the time of the

[1] Indian Evidence Act, I. of 1872, s. 105.
[2] *Per* Rolfe, B., *Reg.* v. *Stokes*, 3 C. & K. 185.
[3] 1 Hale, P.C. 34. [4] Alison, Crim. L., i. 652, 659.
[5] *Banks* v. *Goodfellow*, L.R., 5 Q.B. 549; *Smith* v. *Tebbitt*, L.R., 1 P.D. 398, 434.
[6] Medical Jurisprudence, p. 808.

crime, was cerebral, or caused by stimulants, and whether the appearances of insanity exhibited after arrest are genuine or feigned. Much interesting information on the latter point will be found in Taylor, ii. 494, and Chevers, 824. In dealing with the evidence of medical witnesses, it must always be remembered that their function is to assist, not to supersede the judge. The medical witness states the existence, character, and extent of the mental disease. The judge has to decide, or to guide the jury in deciding, whether the disease made out comes within the legal conditions which justify an acquittal on the ground of insanity.

§ 182. The nature and operation of insanity as bearing on criminal questions is fully discussed by Sir James Stephen,[1] by Taylor,[2] and by Dr. Chevers.[3] Little practical assistance will be obtained from the numerous judicial cases which they cite. Dr. Taylor justly remarks[4] "that there are no certain legal or medical tests whereby homicidal mania can be demonstrated to exist. Each case must be determined by the circumstances attending it." In most cases the particular outbreak complained of is a symptom in a long and advancing course of disease, which can be traced back, and of which some history remains. In the case of criminals of a low class, however, such knowledge of their previous condition may be unattainable or untrustworthy. It seems also to be undoubted, that homicidal impulses appear unexpectedly in persons who have never exhibited any previous indications of mental disease.[5] Cases of complete *dementia* are also known to have arisen from a sudden shock.[6] Such instances would be most likely to occur where madness was inherited.[7] In general, however, the assertion that a crime was committed under the impulse of insanity, which had never exhibited itself before, would be looked on with extreme suspicion. The probability would be that it had been prompted by an ordinary criminal impulse, or by some artificial stimulant, such as alcohol, opium, ganja, or bhang.[8] In India it has often been set up as a justification, that the prisoner was suffering under extreme irritability arising from fever, rheumatism, or other internal complaints. Unless it could be shown

[1] 2 Crim. L. 133—146. [2] Chaps. 98 & 99, ii. pp. 545—576.
[3] Pp. 627, 774, 824. [4] Vol. ii. 562.
[5] 2 Steph. Crim. L., 138, citing Griesinger, 263—267.
[6] Taylor, ii. 488. [7] *Ibid.*, ii. 492.
[8] Chevers, 779, 786, 795, 813; *Reg.* v. *Sakharam*, 14 Bom. 564.

that such diseases had induced a state of delirium, causing unconsciousness of the nature of the acts committed, such a plea would be wholly ineffectual.[1] Religious fanaticism is also, in India, a predisposing cause to crime, which must not be confounded with insanity. In some cases the act arises from the idea of spiritual benefits to be derived from the death of the victim. In some, from the criminal promptings of a diseased imagination, unrestrained by worldly considerations or social opinion. In some, from the constant use of stimulants.[2]

183. In all cases where previous insanity is set up, it is most material to consider the circumstances which have preceded, attended, and followed the crime: Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether, after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection; whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material, as bearing on the test which Bramwell, B., submitted to a jury in such a case: "Would the prisoner have committed the act if there had been a policeman at his elbow?"

§ 184. A different class of cases from any of those just discussed, is one to which I might apply the term "inferential insanity." In cases of this sort no suspicion of insanity would rest upon the prisoner, apart from the crime. But from the character of the crime itself, its suddenness, violence, cruelty, and atrocity; its apparent absence of motive or purpose; a suggestion is raised that the offender must have been insane at the time of its committal. A defence of this sort is generally set up, when the facts admit of no other, and it is usually eked out with evidence of previous outbursts of eccentricity or violence, and suggestions of hereditary insanity, or of former diseases which might possibly have affected the brain. It is needless to remark how utterly unsafe it would be, to admit a defence of insanity upon arguments merely derived from the character of the crime. In such a case, Rolfe, B., said: "It would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death and the

[1] Chevers, 791—805; *Reg.* v. *Lakshman Daydu*, 10 Bom. 512; *Venkatachalam*, 12 Mad. 459.
[2] Chevers, pp. 810—818.

certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity."[1] In that case a soldier had levelled his gun at the wife of a comrade, and shot her dead, in the barrack room, in the presence of her husband and two other soldiers, without any quarrel or reason that could be suggested. In another case, where a man, equally without assignable motive, shot a woman with whom he had been living, Bramwell, B., said to the jury: "It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But the circumstances of an act being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless, but resistible thirst for blood, would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing the murder. We must return, therefore, to the simple question you have to determine—did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?"[2]

§ 185. It is probable that those who are disposed to find what I have termed "inferential insanity" are influenced by an erroneous tendency, to attribute to the criminal the state of mind of which they have always been conscious in themselves. Human nature is manifold. Man at his best is only a very highly developed animal, with all the instincts and passions of the inferior animals. In him they are softened, modified, and controlled by generations of civilization and education, and restrained by example, social opinion, and the fear of punishment. Man at his worst, as

[1] *Reg.* v. *Stokes*, 3 C. & K. 185. [2] *Reg.* v. *Haynes*, 1 F. & F. 666.

we so often see him in the dock, is very little above the lower animals, and is only made more dangerous by that reason which distinguishes him from them. With him criminal longings are natural and familiar, and he is only kept from yielding to them by the dread of punishment. Cruelty—that is, a desire to inflict suffering for the pleasure of witnessing it—is a natural instinct. We find it in nearly all animals, in nearly all savages, in the lower more than in the upper orders, in the boys of the upper orders more than in the men; among the men of the upper orders, in those who are freed from restraint by the possession of absolute power. Cruelty is the characteristic vice of the despot. When a criminal of the lowest class commits some act of—to us—unaccountable atrocity, he is only giving way to a savage instinct, which presents nothing revolting to his nature. Possibly he may be quite certain of punishment, even of death. But it is an everyday experience that men will encounter certain death from motives, such as jealousy, honour, patriotism, duty, which are not more powerful to their minds than are the animal longings to which the criminal yields.

§ 186. A class of murder which is peculiar to the East is that which is known as "running *amuck*" (*amok*, kill). Crimes of this sort are very fully discussed and illustrated from recorded cases by Dr. Chevers (pp. 781—795). They are all of the same character. A man suddenly attacks another with a deadly weapon, without any apparent motive or provocation. He then rushes about killing every one he meets at random. He makes no attempt at concealment, and seems to have no object except to take as many lives as possible before he is seized. Dr. Chevers thinks that some few of these cases were probably cases of real insanity, while in others the mind may have become disordered by the constant use of ganja or similar drugs. In the majority no such explanation is possible. The criminals appear to have been persons who, sometimes from continual pain and ill-health, sometimes from brooding on some real or fancied wrong, fall into a morbid state of misery, in which everything external to themselves appears to be their enemy. They become possessed with a longing to destroy, and probably with an idea that the mere act of destruction would give them relief.[1] In some cases there seems to have

[1] See Griesinger, 261—271, cited 2 Steph. Crim. L. 137.

been no ground even for this explanation. A savage nature suddenly broke through the feeble restraint which usually kept it down, and went on killing from a mere craving for blood. In most of these cases the judges appear to have, in my opinion wisely, exacted the extreme penalty of death.

An analogy to this class of offence is afforded in England by those domestic tragedies, where a man first kills his wife and then his children. The conjugal relation gives rise to so many occasions for quarrel as almost to justify the cynical remark of Maule, J., that it is never necessary to seek the motive for a murder when the person murdered is the man's own wife. Probably most cases of wife-murder have been preceded by a long course of wife-beating. A brutal nature gratifies itself by hurting the one creature who is always at hand and unable to resist. At last he goes too far, and kills her, and then he falls upon his children, partly in terror, to remove the witnesses of his act, and partly in the frenzy of a nature that has given up all attempt at self-control. Such cases in England are always treated as murder, unless there is conclusive evidence of previous insanity, and, where the criminal has not committed suicide, he is generally hung.

§ 187. It is a curious thing, as showing how seldom a plea of insanity had been successful in any serious crime, that when Hadfield was acquitted on that ground in 1800, the judges did not know what to do with him. They remanded him to custody under some common law power, which they supposed they possessed, the existence of which Lord Campbell seems to doubt. Statutes 39 & 40 Geo. III., cc. 93 and 94, were immediately passed, which supplied the necessary authority in this and similar cases; as, for instance, where a person put upon his trial for a criminal offence was unable, either through insanity, or from being deaf and dumb, to take an intelligent part in the proceedings.[1] All these cases are now provided for in India by legislation.

The Crim. P.C., 1882, provides (s. 341) that "if an accused person, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a court other than the High Court, if such inquiry results in a committal, or if such trial results in a conviction, the proceedings shall be forwarded to the

[1] *Reg.* v. *Berry*, 1 Q.B.D. 447.

High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

This section applies to persons whose inability to understand the proceedings arises from their being deaf or dumb, or ignorant of the language, or from any other similar cause except unsoundness of mind.[1]

The Crim. P.C., Chap. XXXIV., contains rules for the treatment of lunatics. Where a prisoner, against whom a charge is preferred, is shown to be of unsound mind and incapable of making his defence, the case is to be postponed, but to continue pending, and the prisoner is to be released on bail, or kept in custody, according to the character of the offence charged (ss. 464—469).

"Whenever any person is acquitted, upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state especially whether he committed the act or not" (s. 470).

The case is then to be reported to the Local Government, who may commit the person to custody in a lunatic asylum or other safe place (s. 471), or hand him over to his friends for safe keeping (s. 475). If committed to a lunatic asylum under s. 471, he can only be released upon the report of a Commission, to the effect that "they consider that he can be set at liberty without danger to himself, or any other person" (s. 474).

In addition to the powers conferred by this Act, provision has been made by 14 & 15 Vict., c. 81, for the removal from India of persons charged with offences, and acquitted, or not tried on the ground of insanity. Section 1 makes it lawful for the person, or persons, administering the government of the presidency in which such persons shall be in custody, to order such person to be removed from India to any part of the United Kingdom, there to abide the order of Her Majesty concerning his or her safe custody, and to give such directions for enabling such order to be carried into effect as may be deemed proper.[2]

Section 4 provides for the recovery from the lunatic of the expenses so incurred.

[1] *Empress* v. *Husen*, 5 Bom. 262.
[2] *In re Maltby*, 7 Q.B.D. 18.

See also Act XXXVI. of 1858, and Act II. of 1867, as to removal of lunatic prisoners from jail to a lunatic asylum.

§ 188. **Drunkenness.**—Involuntary drunkenness, by the operation of s. 85, places a man exactly in the same position as if his aberration of intellect arose from any of the usual forms of unsoundness of mind. The remarks made upon s. 84 will equally apply to such a case. Voluntary drunkenness is in itself no defence; but where a continual course of drunken habits has brought about a diseased state of the intellect, either of a permanent character or intermittent, as in the well-known form of *delirium tremens*, acts done under the influence of that disease, and not merely of a temporary fit of intoxication, will be judged of under the rules already stated in regard to insanity.[1]

The Penal Code requires it to be assumed that a man voluntarily drunk had "the same knowledge as *he would have had* if he had not been intoxicated." Therefore, where from a given state of facts the law assumes a particular knowledge, or that knowledge is a matter of necessary inference, intoxication cannot be set up. For instance, if a man shoots another he would not be allowed to say that he was drunk, and did not know that he held a pistol in his hand, or that the effect of discharging it would be to cause death. So, if he killed another under circumstances which, had he been sober, could have created no alarm in his mind, he would not be allowed to plead that through intoxication he imagined that his life was in danger. But where it is incumbent on the prosecution to make out specific knowledge of a particular fact, and where the circumstances raise no necessary inference of it, the rule might be different. For instance, if a man is charged with passing off a counterfeit rupee, knowing it to be such, the knowledge must be made out by the prosecution, and is not necessarily to be assumed, though it might be inferred, from the mere fact of passing the coin. Suppose the fact to be established that the man had several good rupees in his pocket, but knew also that he had one bad rupee, still it would have to be made out that he knew he was paying the bad rupee, not merely that he had the means of knowing, if he had taken better precautions. It would be clearly admissible to show that he was in a hurry to catch a train, and therefore did not examine the coin, and I can see no reason why evidence of

[1] 1 Hale, P.C. 32; Steph. Dig. Crim. L., art. 29.

his intoxication should not be admissible for the same purpose. Hurry is a state of mind voluntarily brought about just as much as drunkenness.

§ 189. Section 86 lays down no rule as to the inference of intent in cases of intoxication, but there seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law. Intention is sometimes a presumption of law; sometimes it is a mere fact, to be proved like any other fact. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and, if that result follows, I am assumed to have intended that it should follow.[1] As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention, since, assuming the knowledge, the law will allow no other explanation of the act to be given. But sometimes, in determining the quality of an offence, evidence is necessary of a specific existing state of mind, which must be found as a fact, and cannot be assumed.[2] For instance, supposing a fatal blow to be struck under circumstances of grievous provocation; it might be shown that, notwithstanding the provocation, the defendant had acted, not under its influence, but from a preconceived malicious resolve to kill. If so, the offence would be murder. But the mere fact of the deadly blow would not be sufficient evidence for that purpose. Given the provocation, the legal inference derivable from the character of the blow would be exhausted in making the act be culpable homicide not amounting to murder. Evidence of a different state of mind would be required to constitute the graver charge. In this state of things intoxication would be admissible in evidence, for the purpose of showing that the prisoner had acted under the excitement of drunken passion, rather than under fixed and settled malice.[3] So if a man is found in the house of another by night, the fact that he was drunk would be very material in considering whether he came with the intention of committing a robbery.

[1] *Rex* v. *Meakin*, 7 C. & P. 297.
[2] Steph. Dig. Crim. L., art. 29.
[3] *Rex* v. *Thomas*, 7 C. & P. 817; *Pearson's* case, 2 Lewin. 144.

§ 190. **Consent.**—No suit can be brought in consequence of anything done, or arising out of what is done, with the consent of the person complaining of it. *Volenti non fit injuria.*[1] Consent is a complete answer in such suits, because the court is only concerned with the wrong asserted to have been done to the complainant. In criminal law it is different. Acts are punished as crimes, because it is for the interest of society that they should be prevented. The consent of the immediate sufferer is immaterial, if the injury to society remains.

Sections 87—92 lay down the rules for determining when the claims of society are satisfied by the consent of the individual. These rules provide—

First, for the cases in which consent is permissible;
Second, for the nature of the consent required;
Third, for substituted consent;
Fourth, for assuming or dispensing with consent.

§ 191. *First.*—By s. 87 no consent will authorize any act which is intended to cause death, and therefore if death ensues from the doing of an act which had no other object, the consent of the sufferer will not save the agent from being guilty of culpable homicide. Where a duel ends fatally, the surviving party is guilty of murder by English law,[2] and of culpable homicide not amounting to murder under the Penal Code.[3] The person who helps another to commit suicide, as, for instance, any one who assists a Hindu widow to commit *sati*, is similarly guilty.[4] And so it would be if one were to administer poison to another, to save him from public execution, or even from incurable disease, such as cancer or hydrophobia.

The mere consent of a person above eighteen years of age will justify any harm resulting from an act which is not intended to cause, and which is not known by the doer to be likely to cause death or grievous hurt. The most familiar instances of this sort are the ordinary games, such as fencing, single-stick, boxing, football, and the like. And it is obvious that the protection extends to injuries which actually cause death or grievous hurt, provided it was

[1] *Thomas* v. *Quartermaine*, 18 Q.B.D. 685; *Membery* v. *Gt. Western Railway*, 14 App. Ca. 179.
[2] *Reg.* v. *Barronet*, 1 E. & B. 1; S.C. Dearsl. & Pearce, 51; 1 Hawk. P.C. 96.
[3] Section 300, Exception 5, *post*, § 423.
[4] 1 Hawk. P.C. 78; P.C. s. 306.

not intended. As, for instance, if an eye is put out in fencing, or one is killed by a cricket-ball. It is essential, however, that the act consented to, though not intended to cause death or grievous hurt, should be one which from its nature is not likely to have such a result. No amount of consent would protect a person who entered into a fencing match, however friendly, which was conducted with naked swords.[1] In a case where a football player killed another by what is known in the game as "charging" him, and thereby rupturing his intestines, it was contended that "charging" was fair according to the rules of the game. Bramwell, B., laid it down that this was immaterial, as the rules of the game could not sanction anything that was likely to cause death. If the prisoner intended to cause serious hurt, or knew that he was likely to cause it, and was indifferent and reckless as to whether he would produce serious injury or not, his act was unlawful. The fact that what he did was in accordance with the rules of the game was only important as tending to negative any malicious intention.[2]

§ 192. The harm done must not be different in kind, or degree, from what the person has agreed to run the risk of. Therefore, if two men were to begin boxing with gloves, one would not be justified in throwing aside the gloves, and striking with his fist. Similarly, either of the players in a fencing match would be bound to discontinue the moment the button fell off his foil. On the same principle, all the recognized rules of the contest must be observed, for they enter into the estimate of the risk. Where two men are sparring, every blow must be fair. And so it is laid down in East[3]—

"That in cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms. For, if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious."

It may be questioned whether a prize-fight between two

[1] 1 Hale, P.C. 473; 1 Hawk. P.C. 86.
[2] *Reg.* v. *Bradshaw*, 14 Cox, 83. [3] 1 E.P.C. 269.

adults, fairly conducted according to English rules, would be protected under this section. Notwithstanding the apparent ferocity of the contest, it may well be argued, that it is not on the whole likely to cause death or grievous hurt; certainly the annals of boxing are in favour of such a position, where the combatants are at all matched. On the other hand, there is no doubt that the law of England, which countenances such sports as fencing, wrestling, and cudgel playing, always treated prize-fighting as absolutely illegal, and even extended the criminality to every one present and countenancing the transaction.[1] The English writers seem to rest this view on various grounds; partly that mere manly sports are intended as friendly trials of skill, in which the possible hurt is only an incident, whereas in a prize-fight, or other deliberate fight with fists, the object is to inflict hurt, and that this object in itself makes the contest unlawful.[2] No doubt, in a prize-fight, just as in a fight between two schoolboys (who, however, would not be protected by s. 87, if under eighteen), the object is to do each other as much harm as fists are capable of, till one or the other gives in. But if that harm is, in all practical experience, something less than grievous hurt, it would seem to be protected by s. 87, unless the contest is in itself unlawful on other grounds, in which case it would still be criminal under s. 91. In recent times, a practice has sprung up of glove-fights, which are undistinguishable from the old prize-fights, except in the fact that the combatants wear gloves. In one case of the sort, the judge directed the jury that the contest would be lawful if it were a mere exhibition of skill in sparring, but that if the parties met, intending to fight till one or other gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether the combatants fought in gloves or not. He left to the jury the question, "Was this a sparring match or a prize-fight?" The jury convicted the prisoners, finding it was a prize-fight, and the direction of the judge was upheld by the Court of Crown Cases Reserved.[3] Another reason alleged is, that the publicity of such contest leads to riot and breach of the peace, and that not only the combatants, but all who encourage them by their presence are

[1] Foster, Crim. L. 260; 1 East, P.C. 270.
[2] 1 Hale, P.C. 472; Foster, Crim. L. 259; *Reg.* v. *Canniff*, 9 C. & P. 359.
[3] *Reg.* v. *Orton*, 14 Cox, 226.

guilty of the same offence.[1] This, of course, would not apply if the contest was carried on in private. Accordingly, where, in a sparring match with gloves, held in a private room, one of the combatants fell from exhaustion and struck his head against a post, from which he died, Bramwell, B., said: "The difficulty was to see what there was unlawful in this matter. It took place in a private room. There was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter, because a fight is a dangerous thing likely to kill; but the medical witness here had stated that the sparring with gloves was not dangerous, and not a thing likely to kill."[2] Probably the element of money in a fight is only material, as tending to make it probable that the fight would be allowed to go on, after it became apparent that serious consequences were likely to result.

§ 193. Acts which are not intended to cause death are not punishable, even though they do cause death, and may be known by the doer to be likely to cause death, provided they are done in good faith for the benefit of a person, who consents and is able to consent; that is, a person above twelve years of age, and in other respects competent to enter into a contract (ss. 88 & 90). Section 88 and ss. 89 and 92 will cover all cases of surgical operations, which will be discussed hereafter (§ 197). The benefit to be procured must be one accruing to the person endangered. It will therefore not cover the case of persons such as soldiers, policemen, and sailors, who may be ordered to perform acts which will lead to probable, or even to certain death. Their case will come under ss. 76 and 79, if the order given to them is one which their superior officer is bound to give, or is justified in giving. Nor does it include cases of mere pecuniary benefit (Explanation, s. 92). Hence dangerous exhibitions are not protected by it. A person who wheels another over a height on a tight-rope, or who shoots at an apple on his head, however well paid that other may be, is not doing an act for his benefit within s. 88. If an accident happened, the guilt of the doer would depend upon the question of fact: whether the fatality was one which, in the probable course of events, would be likely,

[1] 1 East, P.C. 270; Foster, 260; *Rex* v. *Perkins*, 4 C. & P. 537.
[2] *Reg.* v. *Young*, 10 Cox, 371.

sooner or later, to arrive. If so, it would be an event which was absolutely probable, though, in each particular instance, the chances were against it. Nor are mutilations permissible, which are consented to for some indirect motive, such as making the sufferer an object of charity, or to prevent enlistment as a soldier, or for the purpose of procuring a discharge.[1] Finally, consent will never give validity to acts which are in themselves offences (ss. 91; 89, cl. 4; 92, cl. 4). The consent of a girl under sixteen to be taken away from lawful guardianship, or of a married woman to be enticed from her husband, does not prevent criminality under ss. 361 and 498 of the Penal Code.

§ 194. *Second.*—Under s. 90 consent can only be given by a person who is twelve years of age, unless the contrary appears from the context. The consent must be voluntary, and the person who gives it must be capable of knowing, and must in fact know, the nature and consequences of the act consented to. Difficult questions in respect to consent often arise in offences of a sexual character. "There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that a mere submission involves consent. The mere submission of a child when in the hands of a strong man, and most probably acted on by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law."[2] So in the case of an indecent assault upon young boys, the judge left to the jury the question "whether the boys merely submitted to the filthy act, ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it, and consented to what the defendant did. In the former case they would find the defendant guilty; in the latter case they would acquit him." The jury found him guilty upon the first alternative, and the direction was held to be correct.[3] So where a girl allowed a quack doctor to have connection with her, he having informed her that it was necessary to perform a surgical operation upon her, and she submitting to what she believed was a surgical operation, he was held to have committed a rape.[4] In one respect the English law

[1] 1 Hale, P.C. 411; 1 Hawk. P.C. 108; *Reg.* v. *Baboolun*, 5 Suth. Cr. 7.

[2] *Per* Coleridge, J., *Reg.* v. *Day*, 9 C. & P. 722.

[3] *Reg.* v. *Lock*, L.R., 2 C.C. 10. [4] *Reg.* v. *Flattery*, 2 Q.B.D. 414.

was more indulgent than the Penal Code. Both systems admit that a man commits a rape who has connection with a woman who, from idiocy, is unconscious of the nature of the act, and is incapable of signifying consent or dissent. But the English judges hold that a consent arising from mere animal instinct is sufficient, and that where the female is of an age to have such instincts, and in the absence of some evidence to the contrary, it could not be inferred that the act was without her consent.[1] The Penal Code, however, requires the intelligent consent of a woman who is able to understand, not only the nature, but the consequences of the act. An idiot may be as capable of assenting to sexual intercourse as any other female animal. But it is evident that the nature and consequences of illicit intercourse with a woman, are very different from what they would be in the case of a cow. It is precisely this difference which the Indian law requires that she should be able to understand, and, understanding it, still to consent.

In all the above cases the court held that the prisoner must be acquitted, if he was deceived by the actual submission into a belief that a real consent was being given to the act complained of. The same rule is laid down in the first clause of s. 90, but not in the second. It would seem, therefore, that a defendant who relies on the consent of a person of unsound mind, or in a state of intoxication, must take the risk of its being found that the mental state of the person affected was not such as to excuse his act (see *ante*, § 122).

§ 195. It is obvious that there can be no consent at all, when it is given under the influence of fear, or under misconception of facts. An instance of the latter sort occurred where the accused, a snake charmer, induced the deceased to allow himself to be bitten, in the belief that the charmer had power to cure snake-bites by charms.[2] So it has been held in England that a man who induced a girl to sleep with him, she being ignorant that he had a venereal disease, might be convicted of an indecent assault; that is to say, that her consent was nullified by the fraud practised on her.[3]

§ 196. *Thirdly.*—By s. 89, where a person is under twelve,

[1] *Reg.* v. *Fletcher*, L.R., 1 C.C. 39; *Reg.* v. *Barrett*, L.R., 2 C.C. 81.
[2] *Reg.* v. *Poonai Futtemah*, 12 Suth. Cr. 71; S.C. 3 B.L. R.A. Cr. 25.
[3] *Reg.* v. *Bennett*, 4 F. & F. 1105; *Reg.* v. *Sinclair*, 13 Cox, 28.

or is of unsound mind, the consent of the guardian or other person having charge of him, is sufficient, and may be substituted for that of the person who is, by infancy or otherwise, incapable of forming an opinion on the point. Here also the act done must be for the benefit, as above explained, of the person for whom it is done. The section proceeds to lay down limitations as to the nature of the act which may be permitted, which are not found in s. 88. Substantially they embody the considerations upon which a person of mature mind would probably act in consenting to incur any risk.

§ 197. *Fourthly.*—Under s. 92 consent may be absolutely dispensed with, where the circumstances are such as to render consent impossible, or where in the case of a person incapable of assenting, there is no one at hand whose consent can be substituted. The same limitations apply as in s. 89.

The protection of persons who perform surgical operations which end fatally, or which produce injurious consequences that were not anticipated, is made by the Penal Code to rest upon the principle of a consent, express or implied, having been given to the operation. The same principle is adopted by Sir James Stephen in arts. 204 and 205 of his Digest of Criminal Law. He says: "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their trust." The English Draft Code of 1879 makes no reference to consent. By s. 67, "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit; provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case." Of course actual dissent would be one of the circumstances of the case. There are some extreme operations, such as those resorted to in certain cases of cancer, which entail such terrible suffering, with such a small chance of success, that many men of ordinary strength of character would prefer to die quietly rather than submit to them. No surgeon would, or ought to, venture to perform tracheotomy or excision of the tongue upon an adult who, upon full consideration of the facts, refused to encounter the risk. On the other hand, no medical man would, or ought to, hesitate to extract a tooth, or to lance a boil of a child of thirteen, however much it might struggle and howl, and I cannot imagine that he could be prosecuted

for inflicting hurt without due consent. Possibly in such a case, if it were conceivable, a very scrupulous judge might require the support of s. 95. In most instances the consent of a patient is never asked to an operation. He is told that it is considered necessary, and he submits to it. In such a case consent would be implied from submission. The mere fact of an adult placing himself under treatment in a surgical case would, I have no doubt, carry with it an implied readiness to submit to everything that was necessary for a cure. If his state of health rendered it advisable that the prospect of an operation should be kept from him, and if he were placed under chloroform, and operated on, without knowing what was about to take place, and if such a proceeding was a proper one for his own benefit, a judge or jury might reasonably infer his consent. In a case where an ignorant practitioner performed an operation, so imminently dangerous that skilful surgeons hardly ever attempt it, viz. cutting out internal piles, and the patient bled to death, it was held that he could not claim the benefit of s. 88, as a patient cannot be held to accept a risk of which he is not aware, and which even the operator does not appear to have suspected.[1]

§ 198. **Compulsion** is of two sorts: it either arises from the act of an authority which, rightly or wrongly, has for the time being superseded the Government of the country, or from the acts of private persons, who, without any show of legality, proceed in open defiance of law. Section 94 appears to refer exclusively to the latter class of cases. There are obvious reasons why a Code, which assumes the continuance of law and tribunals, should take no notice of a state of things in which both have ceased to exist. It may be advisable, however, to offer a few remarks upon that branch of the subject.

§ 199. The effect of foreign conquest is to annul, or suspend, the ordinary sovereignty of the conquered country; and, while the occupation lasts, the laws of the subject State can no longer be rightfully enforced, or be obligatory upon the inhabitants who remain and submit to the conquerors. No laws other than those of the conquerors can, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty there can be no claim to obedience.[2]

[1] *Sukaroo Kobiraj* v. *Reg.*, 14 Cal. 566.
[2] *Per* Mr. Justice Story, cited 3 Phill. Int. L. 737—739.

In cases of civil war, there is greater difficulty; for the first stage of a civil war is always, and necessarily, termed rebellion, and those who take part in, or aid it, rebels and traitors. But it is quite clear that, with respect to civil war also, obedience involves sovereignty, and sovereignty is tested by protection. Sir Robert Phillimore says:—

"The case supposed is always one of the greatest nicety and difficulty. It would rather seem, as a matter of speculation, that when an old Government is so far overthrown that another Government entirely claims, and at least partially exercises, the jurisdiction which formerly belonged to it, the individual is left to attach himself to, and to become, by adoption at least, the subject of either Governments. The analogy under which it is most just to range such cases has been thought to be that which has just been discussed, viz. the rule which applies to cases of foreign conquest, where those only are bound to obedience and allegiance who remain under the protection of the conqueror." [1]

So the stat. 11 Hen. VII., c. 1, which was passed after the Wars of the Roses, recited "that the subjects of England are bound by the duty of their allegiance to serve their prince and sovereign lord for the time being in defence of him and his realm against every rebellion, power, and might raised against him;" and enacted that no person attending upon the King for the time being in his wars, should be punishable for such service. The general principle was laid down in s. 70 of the Draft Code of 1879: "Every one is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the sovereign power, in and over the place where the act is done."

§ 200. There is very little upon this point to be found in the English decisions. The rebellion of 1688 was successful and permanent, while those of 1715, 1745, and 1798 were so immediately unsuccessful that they gave birth to no apparently legal state of things. The rebellion against Charles I. is the only instance in English history, apart from disputed successions to the Crown, in which a Government, which had been completely overthrown and replaced by a different constitution, has itself been afterwards restored. Several cases are accordingly to be found in that series of trials which took place after the Restoration of Charles II. In

[1] 3 Phill. Int. L. 739; 1 Hale, P.C. 49.

Axlett's case,[1] an officer who commanded the guards at the trial and execution of Charles I., pleaded that all he did was, as a soldier, by command of his superior officer, whom he must obey or die. This was held to be no excuse, as his superior officer was a traitor, and where the command is traitorous, obedience to it is also treason. This decision, it will be observed, is in accordance with s. 94 of the Code. In *Sir Henry Vane's* case[2] the charge was treason against Charles II., and the overt acts were that he was one of the State Council, and that he took command of the forces by sea and land, and appointed officers. He pleaded that the King was then out of the kingdom, and out of possession; that Parliament was the only power *regnant*, and that what he did was by its authority. In fact, he appears to have relied on the principle of 11 Hen. VII., c. 1. The court overruled his defence, holding that Parliament was dissolved by the death of the King, which was immaterial if it continued to be the sole depositary of power, and that from the death of Charles I. his son was *de facto*, as well as *de jure*, King of England, which was certainly untrue. Sir Michael Foster obviously considered this ruling to be unsound.[3] Various cases arising out of the rebellion of 1745 will be found in Foster. The most important as bearing upon this subject is *McGrowther's* case,[4] where a lieutenant in the rebel army pleaded that he was a tenant of the Duke of Perth; that on being summoned by the Duke to take up arms he refused, and was then told that he should be forced and bound with cords; and that the Duke threatened to burn the houses and drive off the cattle of all who refused to follow him. It was laid down by Lee, C.J., that the only force that could excuse was a force upon the person and present fear of death, and this force and fear must continue all the time the party remains with the rebels.[5]

Where an authority founded on rebellion has settled down into an apparently legal form of Government, I should suppose that every one would be justified in obeying and acting under its orders, in the ordinary course of civil administration, even though such orders were illegal in their origin and procedure. So it was held in the United States, that a person who had received, and was accountable for, public money, was discharged by showing that it had

[1] Kelyng, 13. [2] Kelyng, 15. [3] Foster, Crim. L. 204.
[4] Foster, Crim. L. 13. [5] 1 Hale, 50; 1 East, P.C. 70.

been seized and appropriated by the rebel authorities, without any fault or negligence on his part.[1] But such obedience would be no defence if the acts committed were in direct and voluntary furtherance of the rebellion itself, or were crimes which could not be justified under the orders of any authority (*ante*, §§ 82, 95).

§ 201. As regards compulsion exercised in time of peace by mere private persons, the law is more severe, as in most cases there is a remedy at hand. The mere menace of future death will not be sufficient, however likely it may be to be executed.[2] The threat must be of instant death, made under circumstances which render it reasonably likely that it may be executed on the spot. Even such a threat will not excuse a person for committing murder, or an act of treason punishable with death. If the alternative is offered to him of dying as an innocent man or a criminal, he is bound to accept the former; and this was also the law of England.[3] Nor will even a threat of immediate death be an excuse if he has voluntarily, or under any weaker form of compulsion, exposed himself to the threat; as, for instance, if he has joined a secret society for criminal purposes, which enforces obedience to its orders by death (Explanation 1). *A fortiori*, it is no defence to a charge of giving false evidence that the witness had been coerced into doing it by the police inspector;[4] or to a charge of offering bribes to public servants, that the servants were so corrupt that it was necessary to bribe them in order to avoid molestation and pecuniary injury.[5]

§ 202. **The Right of Private Defence** (I.P.C., ss. 96—106).—The whole law of self-defence rests on these propositions: (1) that society undertakes, and, in the great majority of cases, is able, to protect private persons against unlawful attacks upon their person or property; (2) that, where its aid can be obtained, it must be resorted to; (3) that, where its aid cannot be obtained, the individual may do everything that is necessary to protect himself; but (4) that the violence used must be in proportion to the injury to be averted, and must not be employed for the gratification of vindictive or malicious feeling. It is evident that proposition (1) is the basis of the entire law. No one would

[1] 1 Bishop, Crim. L., s. 351. [2] 1 Hale, P.C. 51.
[3] 1 Hale, P.C. 51. [4] *Reg.* v. *Sonoo*, 1 Suth. Cr. 48.
[5] *Reg.* v. *Mugintall*, 14 Bom. 115.

dream of applying the refinements of the Penal Code to an unsettled country, where every one carries his life in his hand; and proposition (2) rests upon and assumes proposition (1).

§ 203. Section 99 lays down two classes of cases, in which self-defence is absolutely forbidden. First, where there is time to have recourse to the protection of public authorities, and, secondly, with certain limitations, where the act is being done by, or under the direction of, a public servant.

The first case rests upon the assumption that self-defence is unnecessary. "If A fears, upon just grounds, that B intends to kill him, and is assured that he provides weapons and lies in wait so to do, yet without an actual assault by B upon A or upon his house, to commit that fact, A may not kill B by way of prevention. For the law hath provided a security for them by flight, and recourse to the civil magistrate for protection."[1] But the fact that, even after warning of an impending attack, he has not procured the necessary protection, does not deprive him of the right of self-defence when the danger actually arises.[2] The circumstance might, however, be very material if a question arose, whether the injury ultimately inflicted upon the assailant was *bonâ fide* an act of self-defence, or was done from motives of malice and revenge.

§ 204. Secondly, the clauses in favour of public servants rest partly on the probability that their acts will be lawful, in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary, since the law will set right what has been wrongly done in its name; and, lastly, on the ground that it is for the good of society that public servants should be protected in the execution of their duty, even where they are in error.

Where the act intended by a public servant is itself lawful, the only possible defence for one who resists, is that he did not know that the person resisted was a public servant, or was authorized by a public servant. It will be observed that Explanations 1 and 2 of s. 99, which correspond to clauses 1 and 2 of the same section, contemplate different states of things. The first refer to acts which a public servant can do by his own authority; as, for instance, the arrest by a policeman of any person who comes within

[1] 1 Hale, P.C. 52; *Reg.* v. *Jeolall*, 7 Suth. Cr. 34.
[2] *Narayan Pattabhai*, 14 Bom. 441.

the provision of s. 54 of the Criminal Procedure Code. The second, to acts for which he must receive a special authority from a superior; as, for instance, the seizure of the property of a judgment debtor in execution of a decree against him. In the former case, all that is required for the protection of the officer is that his official position should be known. In the latter case this alone is not sufficient, unless it also appears that he has a special warrant for the action which he is taking. Lord Hale says upon this point, that a bailiff sworn in and known in the vicinity—as, with us, a policeman in his uniform—need not notify himself to be such by express words; but it shall be presumed that the offender knew him. But it is not so in the night-time, unless there is some notification that he is a constable. But whether it be in the day or the night, it is sufficient notice if he declares himself to be the constable, or commands the peace in the King's name. If, however, it be a private bailiff, either the party must know that he is such, or there must be some such notification thereof, whereby the party may know it, as by saying "I arrest you," which is of itself sufficient notice; and it is at the peril of the party if he kills him after these words.[1] But as to the writ or process against the party, there is no difference between a public and a private bailiff; for, in either case, if the party submit to the arrest, and do demand it, he is bound to show at whose suit, for what cause, out of what court the process issues, and when and where returnable.[2] Where the arrest is lawful, and made by one who states the charge on which it is made, resistance is unlawful, whether the offender did or did not know that under the circumstances he could lawfully be arrested.[3]

§ 205. Where the act of a public servant is unlawful, and is likely to cause death or grievous hurt, resistance to it is necessarily justifiable, as any redress that might be afforded by an appeal to superior authority would come too late. The improbable but conceivable case of an attempt to execute or flog the wrong man, or a man against whom no such sentence had been passed, would come under s. 99, cl. 1 and 2. In cases of other wrongful acts not attended by such consequences, the right to resist will depend upon whether the public servant can be said to have been "acting

[1] 1 Hale, P.C. 460.
[2] 1 Hale, P.C. 458; note (*g*), Crim. P.C., s. 80.
[3] *Reg.* v. *Bartley*, 4 Cox, 406.

in good faith under colour of his office, though that act may not be stoutly justifiable by law."

§ 206. Acts purporting to be done under the authority of the law may be illegal in one or other of four ways.

First.—Where the warrant under which the officer acts is on its face legal, even though defective in form, and is issued by an authority competent to issue such a warrant, but was improperly or irregularly issued.

Second.—Where the warrant is issued by a competent authority, but is on its face illegal.

Third.—Where there is a good authority to do a particular act, but it is done in an illegal way by the officer entrusted with the execution of it.

Fourth.—Where the act is ordered by one who had no jurisdiction to order it, or executed by one who had no authority to execute it.

In applying the English cases upon this subject, most of which arose out of the killing of a constable or other officer, it is necessary to bear in mind the peculiar doctrines of the English law as to homicide. "When a minister of justice, as a bailiff, constable, or watchman is killed in the execution of his office, in such a case it is murder," and it makes no difference that the killing was wholly unintentional, provided it occurred in the act of resistance.[1] But where the officer is doing an act in which he is not protected by his warrant, he is in the same position as if he had none. He may be resisted to such an extent as any other man might be resisted who was doing the same act. If he is killed by violence, in excess of what the case requires, this is manslaughter, the excess rendering the killing unlawful, but the provocation arising from the illegality of the officer's conduct reducing it below murder.[2] In all such cases, therefore, where the killing is held to be murder, it must be taken that mere resistance was unlawful. Where the killing is only manslaughter, the mere resistance was lawful, the excess only constituting the crime.

§ 207. In the first of the four cases, resistance is always unlawful. "It is sufficient if the process itself be legal in the frame of it, and issue in the ordinary course of justice from a court or person having jurisdiction in the case. No

[1] 1 Hale, P.C. 39, 457, 472; Foster, Crim. L. 258, 308.

[2] 1 East, P.C. 309; Foster, Crim. L. 312; *Reg.* v. *Lockley*, 4 F. & F. 155, p. 159; *Reg.* v. *Chapman*, 12 Cox, 4.

error or irregularity in the previous proceeding will affect it, or excuse the party killing the officer in the execution of it from the guilt of murder; and therefore if a *capias ad satisfaciendum*, *fieri facias* (warrant to seize the creditor's person or goods), or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it; upon an indictment for this murder it is only necessary to produce the writ or warrant, without showing the judgment or decree; for however erroneously the process issued, the sheriff must obey, and is justified by it.[1] So, although the cause be not expressed with sufficient particularity, the officer is justified if enough appear to show that the magistrate had jurisdiction over the subject-matter. This must, however, be understood of a warrant containing all the essential requisites of one. In all kinds of process, both civil and criminal, the falsity of the charge contained in such process—that is, the real injustice of the demand in one case, or the party's innocence in the other—will afford no matter of alleviation for killing the officer, for every one is bound to submit himself to a court of justice."[2] Accordingly it was held in England that the police were protected by a warrant issued by a competent magistrate, though irregular in form.[3] And so it was held in India that it was unlawful to resist arrest upon a warrant issued under s. 351 of the Civil Procedure Code, which was sealed by the Court, but initialled instead of being signed;[4] or to resist the police in carrying out a distraint under s. 19 of the Madras Rent Recovery Act, though the attachment was in fact unlawful.[5]

§ 208. In considering, for this purpose, whether a warrant or order was issued by a competent authority, it must be remembered that the question is, whether the authority was competent to issue the sort of warrant or order which is placed in the hands of the officer for execution; not whether he was competent to issue the particular warrant or order, which must depend upon the facts and circumstances of the actual case. Also, that the general rule for determining

[1] If, however, the proceeding is against the party who sues out the writ, he must show the judgment as well as the writ. *Cotes* v. *Michill*, 3 Lev. 20.

[2] 1 East, P.C. 309; 1 Hale, P.C. 457; 1 Hawk. P.C. 103; Foster, Crim. L. 311; *Curtis's* case, Foster, Crim. L. 133.

[3] *Reg.* v. *Allen*, *post*, § 226. [4] *Reg.* v. *Janki Prasad*, 8 All. 293.

[5] *Reg.* v. *Ramayya*, 13 Mad. 148.

jurisdiction is "that nothing shall be intended to be out of the jurisdiction of the superior courts, but that which specially appears to be so; but that nothing is intended to be within the jurisdiction of an inferior court, but that which is expressly alleged."[1] Both of these points were illustrated in the following case. In England a peer cannot be arrested or imprisoned for debt. In violation of this rule the Court of Common Pleas issued a writ for the arrest of the Countess of Rutland, which showed her rank upon its face. It was held, however, that the sheriff and his officers were justified in executing the writ, notwithstanding the principle that ignorance of law is no excuse, since in some cases, as in cases of contempt of court, such a writ can issue against a peer.[2]

§ 209. The second case may be illustrated by the well-known instance of the General Warrants, which were for the first time discussed in the prosecutions arising out of the publication of the *North Briton* by Mr. Wilkes, in 1763. The Secretary of State issued warrants directing the arrest of the printers and publishers of the *North Briton*, without specifying their names, and ordering the search for and seizure of seditious books, papers, and documents, without specifying what. It appeared that warrants of this sort had been constantly issued by the Secretary of State, and their authority had never been disputed. They were decided by Pratt, C.J., afterwards Lord Camden, to be wholly illegal, and heavy damages were awarded against all who had acted upon the warrants.[3] It is obvious that no one could be expected to submit to an authority so vague in its terms. This was the principle on which the judgment of the Queen's Bench was given in the case of *Howard* v. *Gossett*. There the plaintiff had been arrested by the Serjeant-at-arms of the House of Commons on a warrant which set out no reason for the arrest. The Court of Queen's Bench held that it gave no protection to the officer executing it. Coleridge, J., said:[4] "The warrant does not disclose that the

[1] *Per* Parke, B., *Howard* v. *Gossett*, 10 Q.B., at p. 453; S.C. 16 L.J. Q.B., at p. 349, *post*, § 209.

[2] *Countess of Rutland's* case, 6 Rep. 52*a*. Very recently (1893) the Dowager Duchess of Sutherland was arrested and imprisoned for six weeks for contempt of an order of the Court of Chancery.

[3] *Leach* v. *Money*, 19 St. Tri. 1002; 3 Burr. 1692; *Entick* v. *Carrington*, 19 St. Tri. 1002.

[4] 10 Q.B., p. 377; S.C. 14 L.J. Q.B. 375.

party was charged with any offence, or had been convicted of any; still less does it show the nature of the offence. If for the House of Commons in the warrant you substitute any other authority known to the constitution, it is quite clear that the warrant would be bad. The party sought to be arrested under it might lawfully resist, or, if arrested, would be discharged upon the return to a writ of *habeas corpus*." This decision was reversed on appeal. Parke, B., who delivered the judgment, agreed with the lower court that the warrant would have been void, if it had been issued by a magistrate acting under some special authority to take a man into custody under some special circumstances. He considered, however, that the warrant of the House of Commons must be treated in the same way as if it had been issued from one of the superior courts, and that such a warrant would be valid even if it expressed no cause at all, as every presumption must be made in favour of the legality of every act of the superior courts.[1] The former judgment would evidently govern the case of all warrants issued by Mofussil courts, and by magistrates in the Presidency towns.

§ 210. The same principle has been applied, both in England and in India, where the warrant was upon its face ambiguous or uncertain; as, for instance, where a person was arrested upon a warrant which omitted her Christian name.[2] This is intelligible enough. A warrant to arrest Smith or Ramasawmy may apply to a hundred different persons. No one is bound to appropriate the warrant to himself, nor has the officer any authority to supply, by his own knowledge or otherwise, that which is left uncertain in the warrant. The same can hardly be said of an old case, which is still cited as an authority in the law books, where the arrest of Sir Henry Ferrers under a warrant, in which he was so named, was held illegal, because the warrant went on to describe him as a knight, whereas he was really a baronet.[3] In two cases in India the Bombay High Court has held warrants invalid where the full name of the individual was given, but without any description by way of residence to distinguish him from any other person of the same name. In each of these cases, however, the form of

[1] 10 Q.B., pp. 452—455; 16 L.J. Q.B., p. 349.
[2] *Reg.* v. *Hood*, 1 Moody, C.C. 281.
[3] *Reg.* v. *Ferrers*, Cro. Car. 371.

warrant given by the statute directed that the residence should be stated.[1]

§ 211. In the third class of cases resistance appears to be lawful in England. Accordingly it was held that killing was only manslaughter "where a good warrant is executed in an unlawful manner; as if a bailiff is killed in breaking open a door or window to arrest a man; or, perhaps, if he arrest one on a Sunday, since 29 Car. II., c. 7, by which all such arrests are rendered unlawful."[2] In India the question would be, whether the bailiff was acting in good faith under colour of his office, so as to come within the terms of s. 99. Nothing is said to be done in good faith which is done without due care and attention (P.C., s. 52). Where a police officer attempted, without a search-warrant, to enter a house to search for stolen property, it was held that resistance to him was unlawful, and could not be justified on the ground of self-defence.[3] In that case, it appears that the police were as much in search of persons as of property, and for the former purpose their entry was lawful. The judgment, however, was rested on the fact that it did not appear that the police were acting otherwise than in good faith. On the other hand, where a bailiff broke open the doors of a third person, in order to seize the goods of a judgment-debtor which were supposed to be therein, and it turned out that there were no such goods, the same Judge, Melvill, J., who had decided the previous case, held that the act was unlawful, and that resistance to it was not punishable under s. 183 or s. 186 of the Code.[4] I presume that the same decision would have been given if the defendant had been charged under s. 353 with using criminal force to the bailiff, and he had pleaded that he was acting lawfully in defence of his property. When resistance was offered to a police officer who attempted to search a house without a written authority, under a section of the Crim. P.C. of 1872, which corresponds to s. 165 of the Code of 1882, the court of the N.W. Provinces held that a conviction under s. 353 could not be maintained.[5] It has also been held that no offence was committed under

[1] *Re Hastings*, 9 Bom. H.C. 154; *Alter Caufman* v. *Government of Bombay*, 18 Bom. 636.
[2] Hawk. P.C. 104; 1 Hale, P.C. 458.
[3] *Reg.* v. *Vyankatrav*, 7 Bom. H.C. C.C. 50.
[4] *Reg.* v. *Gazi Aba*, 7 Bom. H.C. C.C. 83.
[5] *Reg.* v. *Narain*, 7 N.W.P. 209.

s. 183, where a bailiff had been resisted in attempting to attach property under a warrant which had ceased to be in force by lapse of time.[1]

§ 212. Similar questions would arise where a good warrant was wrongly executed. A warrant for stealing a horse was issued against John Hoyes, whereas it should have been issued against Richard Hoyes, who was the son of John. If the constable had arrested John Hoyes, the man would have been discharged, but the constable would have been safe (*ante*, § 207). Instead of doing so, he arrested Richard Hoyes, who was the person really intended. It was held that his act was wholly illegal, and that he was not protected by his warrant. An officer who is directed to arrest John cannot be allowed to form an opinion that Richard was really meant, even though the opinion is a sound one. "Where, indeed, it can be shown that a felony has actually been committed, the constable may throw the warrant aside. It is sufficient to show that he has taken the person who is really charged with the offence, however he may have been misdescribed. He cannot do this where only a misdemeanour is charged," for in such a case he cannot arrest without a warrant.[2] Where a warrant is issued against A.B., and is executed against a person of the same name, who was not the person intended, the liability of the officer for a wrongful arrest, and the right to resist him, would depend upon the question whether he made the arrest in good faith, and believing upon reasonable grounds that he was arresting the right man.[3] On the same principle, where an officer is authorized to do any act without warrant, upon a reasonable suspicion that a particular state of things exists; as, for instance, that a person has committed, or is about to commit a particular crime, resistance to him is unlawful, though the suspicion is unfounded, if the officer *bonâ fide* and reasonably entertained it.[4] Where a warrant authorizes the doing of any act under limitations which are, or but for his ignorance of his duty would be, known to the officer, he is not protected

[1] *Anand Lal* v. *Reg.*, 10 Cal. 18.

[2] *Per* Tindal, C.J., *Hoyes* v. *Bush*, 1 M. & G. 775.

[3] See *Ganga Charan* v. *Reg.*, 21 Cal. 392, where it was unnecessary to decide the point.

[4] *Bhawoo Jivaji* v. *Mulji Dyall*, 12 Bom. 377. See *Reg.* v. *Phelps*, Car. & M. 180, and *Rey.* v. *Carey*, 14 Cox, 214, where it was held that the policeman acted without any grounds of suspicion.

by his warrant if he violates them; as, for instance, if he arrests a witness on his way to court,[1] or breaks open a house in attempting to seize goods under civil process.[2] In neither of these cases did any question of resistance arise. Such resistance would possibly have been held unlawful under s. 99, cl. 1 or 3.

§ 213. In the fourth class of cases, where there is an absolute want of jurisdiction in the official who issues the order, or an absolute want of authority in the person who does the act, resistance is lawful in England, and does not seem to be unlawful by s. 99. The words "not strictly justifiable by law," seem to point to cases where there is an excess of jurisdiction, as distinct from a complete absence of jurisdiction; to cases where an official has done wrongly what he might have done rightly; not to cases where the act could not possibly have been rightly done. For instance, a plaintiff sued in the Mamlutdar's Court in Bombay for possession of a piece of land. The Court gave him a decree for possession, which it could give. It had no power to give, and was not asked for a partition. When the decree came to be executed, it turned out that the land in question was, with other land, in the joint possession of the defendant and others. The collector was consulted on the difficulty, and he ordered the surveyor to divide the land, and to put the decree holder in possession. The defendant resented, and was convicted of obstruction. The conviction was reversed, on the ground that neither under cl. 1 nor 2 of s. 99 was any protection given to an officer, who was doing an act absolutely illegal as regards himself, and wholly *ultra vires* as regards the official who authorized it.[3]

§ 214. In England it has been repeatedly held that an arrest, either on civil or criminal process, may be lawfully resisted, where it can only be made by warrant, and where the warrant, though actually issued, is not in the possession of the officer who makes the arrest. *A fortiori*, of course, where there never had been a warrant.[4] Cases in which arrests have been held unlawful in England, because the warrant was issued in one county and executed in another

[1] *Thakur Doss* v. *Shanker*, 3 Suth. Cr. 53.
[2] *Anderson* v. *McQueen*, 7 Suth. Cr. 12.
[3] *Reg.* v. *Tulsiram*, 13 Bom. 168.
[4] *Galliard* v. *Laxton*, 2 B. & S. 363; S.C. 31 L.J. M.C. 123; *Codd* v. *Cabe*, 1 Ex. D. 352; *Reg.* v. *Withers*, 1 East, P.C. 295, and p. 308.

county,[1] are provided for by the Crim. P.C., 1882, s. 84. So the execution of a warrant by a person not duly authorized is illegal,[2] but the Crim. P.C., 1882, while it requires a warrant to be addressed to one or more persons by name, authorizes the endorsement of it to any other police officer (ss. 77, 79). In England, a practice grew up of issuing warrants in blank, which were afterwards filled up by some subordinate who could not have issued a warrant, with the name of the person to be arrested, or of the person who was to execute the warrant. Such a practice was decided to be wholly illegal, and to give no protection to the officer.[3] In India, however, I imagine the officer would be protected by the seal and signature of the Court, as he could not possibly know the circumstances under which it had been affixed.

§ 215. Subject to the exceptions already discussed, every person has a right to defend his own person against criminal injury or restraint, and his own property against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit such an offence. And what he may do for himself he may do for any one else under similar circumstances (s. 97). This right is not dependent on the actual criminality of the person resisted; it depends solely on the wrongful, or apparently wrongful, character of the act attempted. If the apprehension is real and reasonable, it makes no difference that it is mistaken.[4] It is lawful to kill a lunatic who attacks a man, though the lunatic is not punishable for his act (s. 98). It is lawful to assault a man who is found carrying away one's goods, though the man is a bailiff who is bound to do the act, if his character is not known (s. 99, Explanation 2). It is lawful to shoot a man who is found opening your plate-chest at night, though he happens to be your butler, whom you mistake for a burglar (s. 79). It is even lawful to run the risk of injuring an innocent person, where that risk is inseparable from the proper exercise of the right of resisting a criminal act (s. 106). The extent of the harm which it is lawful to

[1] 1 Hale, P.C. 458, 459; *Reg.* v. *Cumpton*, 5 Q.B.D. 341.

[2] *Broadfoot's* case, Foster, Crim. L. 154; *Dixon's* case, 1 East, P.C. 313.

[3] 1 Hale, P.C. 457; Foster, Crim. L. 312; *Stockley's* case, 1 East, P.C. 310; *R.* v. *Stevenson*, 19 St. Tri. 846; *Housin* v. *Barrow*, 6 T.R. 122; *R.* v. *Winnick*, 8 T.R. 454.

[4] *Reg.* v. *Goburdhan Bhayan*, 4 B.L.R. Appx. 101; S.C. Suth. 13 Cr. 15; *Reg.* v. *Abdul Hakim*, 3 All. 253.

inflict in self-defence is limited: first, by the rule that it is unlawful to kill an assailant, unless the crime he is attempting is one of special gravity (ss. 100, 103); and, secondly, by the general principle that the injury inflicted upon the assailant must never be greater than is necessary for the protection of the person assailed (s. 99, cl. 4).

§ 216. The cases in which injury to the person may be resisted to the extent of killing the offender are laid down in s. 100, cl. 1—6. It will be observed that all of these are cases in which the person attacked would willingly risk his own life to prevent the commission of the offence.[1] Clauses 5 and 6 refer to violations of liberty. Of these, assaults with the intention of kidnapping or abducting are attempts to deprive a person of liberty with a view to the commission of ulterior crimes, which themselves are generally, or probably, such as may be resisted to the last extreme. Clause 6 suggests a case of confinement which is not likely frequently to occur. All arrests made under colour of law assume that the case will immediately be brought before a public authority, who will decide upon their legality. Where the arrest is made by a public servant acting without authority, whether the arrest is by civil or criminal process, it is held in England that resistance, even if accompanied with considerable violence, cannot be punished criminally as an assault.[2] It is, however, assumed by the Code that the public authority, before whom the person unlawfully confined may expect to appear, is one whose duty it would be to let him go free if the arrest was unlawful. Where an English criminal who had escaped to Hamburgh was there unlawfully arrested by a police officer, and put on board an English steamer, and he, while on his way back to England, murdered the constable who had arrested him, it seems to have been admitted by the Court that, if the killing had been solely to secure his liberty, it would have been lawful. In that case the illegality of his arrest would not have secured his release when he came again within English jurisdiction.[3] In *Broadfoot's* case [4] a

[1] See, as to cases in which killing was held justifiable in consequence of personal violence threatening life or grievous hurt, *Reg.* v. *Moizudin*, 11 Suth. Cr. 41; *Reg.* v. *Ramlall*, 22 Suth. Cr. 51.

[2] *Reg.* v. *Osmer*, 5 East, 304; *Galliard* v. *Laxton*, 2 B. & S. 363; 31 L.J. M.C. 123; *Codd* v. *Cabe*, 1 Ex. D. 352; *Reg.* v. *Sanders*, L.R., 1 C.C. 75.

[3] *Reg.* v. *Sattler*, D. & B. 529; 27 L.J. M.C. 50.

[4] Foster. Crim. L. 154.

press-gang, who were acting absolutely without warrant, went on board a merchant ship to press sailors for the naval service; one of the crew fired a blunderbuss at and killed one of the press-gang. It is quite certain that if he had once been taken on board a King's ship he would never have been released on account of any error in the mode of his arrest. The killing was held not to be murder, as the arrest was illegal. It was, however, held to be manslaughter. The report does not say why, but apparently, upon the facts of the case, the shooting was a degree of violence beyond what was necessary for the protection of the merchant seaman from being pressed.

§ 217. Where the violation of person or liberty is not of the aggravated nature of the offences mentioned in s. 100, it may still be resisted by any necessary degree of violence short of killing (s. 101). For instance, it is illegal to confine a man who is found ploughing up his neighbour's land by day, in order to keep him till he can be handed over to the police.[1] But he would not be justified in killing his captor to effect his escape. And even where the violence used in self-defence falls short of death, it will not be justified if a lesser degree of violence would secure the end aimed at, or, according to English law, if the injury inflicted is out of proportion to that which would otherwise be suffered. "A man cannot justify a maiming for every assault; as, if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in all probability his life may be in danger."[2] Where the prisoner got into an altercation at night with a man and a couple of women, and the man struck him a blow, and he struck the other with a knife, Crowder, J., said: "Unless the prisoner apprehended robbery or danger to life, or serious bodily injury (not simply being knocked down), he would not be justified in using a knife in self-defence.[3] So the English Commissioners, in their Report of 1879, say at p. 11, "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring

[1] *Shurufoddin* v. *Kasinath*, 13 Suth. Cr. 64.

[2] *Cook* v. *Beale*, 1 Ld. Raym. 176; *per* Holt, C.J., *Cockcroft* v. *Smith*, 11 Mod. 43.

[3] *Reg.* v. *Hewlett*, 1 F. & F 91.

offenders to justice, yet this is all subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used, is not disproportioned to the injury or mischief which it is intended to prevent." Again, at p. 45, they quote a passage from the first report of the Commissioners who drafted the Penal Code (Appendix M., p. 147), in which, while admitting that it would be illegal for a man to kill another to prevent that other from pulling his nose, they assume that it would be lawful to inflict upon him any harm short of death; "to give the assailant a cut with a knife across the fingers, which may render his right hand useless to him for life, or to hurl him downstairs with such force as to break his leg;" and speak of a man so threatened as "merely exercising a right by fracturing the skull and knocking out the eye of an assailant." Upon this the Commissioners say, "If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not, and never was, the law of England. The law discourages people from taking the law into their own hands. Still, the law does permit men to defend themselves. And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified." This latter limitation is not expressly stated in s. 99, cl. 4, but it is probable that the language of that clause would be held to forbid any flagrant excess in resisting minor wrongs.

§ 218. Offences against property are again divided into two classes, of which one may be resisted to the extent of causing death, while in the second, killing can never be justified. The first class is described in s. 103. Violence is the characteristic of all the offences enumerated in this section. It is the essence of robbery (s. 390), and is the aggravating circumstance which, under cl. 4, enlarges the right of defence, when added to offences which could not otherwise be resisted to the extent of death. Housebreaking by night is always considered an offence of special enormity, as being an invasion of a man's home at a time when he is specially defenceless. Mischief by fire is not only peculiarly dangerous, but requires to be stopped at once by the most means. All this is in affirmance

of the old common law of England.[1] On the other hand, the rights given by this section must be taken with the limitation in s. 99, cl. 4. Every one of the offences stated in s. 103 may in reality be a very trivial affair, which may be warded off with violence falling far short of extreme results.[2] The greatest indulgence is always shown to the acts of a person who suddenly discovers a housebreaker in his house at night. The heinous character of the offence, the uncertainty whether the man is armed, and likely to attempt violence, the want of time for reflection, would in the great majority of cases be an ample justification to any inmate of the house who at once made fatal use of a deadly weapon. But if the size or youth of the offender, his efforts to escape observation when approached, or his entreaties for mercy, showed that no real danger was to be apprehended from him, I imagine that no measures of extreme violence could be justified. In one case in India, a man being disturbed by sounds of breaking in at night, rushed out of his house, and finding a man who had partially effected an entrance, cut off his head with a pole-axe.[3] This was held to be an excessive exercise of the right of self-defence. And so in a case where a person, caught in the act of housebreaking by night, was strangled by the inmates, after he was fully in their power and helpless.[4] On the other hand, where persons, who were on guard in a cutchery, were attacked in the daytime by a gang of persons armed with deadly weapons, who were trying to force their way in, it was held that those inside were justified in firing upon them, as there was a reasonable apprehension that they would suffer death or grievous hurt if an entrance was effected.[5]

§ 219. The cases, of injury to property which only admit of violence short of death, are stated in s. 104. It is obvious that a resort to the extreme limits of violence sanctioned by this section, will only be allowable in very rare cases. No one would be justified in inflicting any very serious injury on a person whom he detected in picking his pocket, or stealing plaintains out of his garden, unless the offender entered into a personal contest which brought the case within the rules of defence to the person, or unless he persisted in his offence so as to render greater violence

[1] 1 Hale, P.C. 485, 493. [2] 1 Hale, P.C. 488; 1 East, P.C. 273.
[3] 2 Wym. Cr. 40. [4] *Reg.* v. *Dhunanjai*, 14 Suth. Cr. 68.
[5] *Reg.* v. *Ramlall*, 22 Suth. Cr. 51.

necessary.[1] In an old English case a boy came into a park to steal wood, and hid himself in a tree when he saw the wood-ranger coming. The latter struck him, and then bound him to his horse's tail. The horse took fright and ran away, and the boy suffered injuries from which he died. This was held to be murder.[2] And so a man who is set to watch his master's yard, is not justified in shooting one who enters it at night, and who goes to the place where fowls are kept, even though he has good reason to suppose the man is about to steal the fowls.[3]

§ 220. It will be observed that all the cases in which self-defence is authorized under ss. 103 and 104, are cases where the injury to property involves a crime. Nothing is said as to injuries which are merely trespasses punishable by civil action, still less where the trespasser is asserting a right, honestly though erroneously believed. In the majority of such cases the injured party would obtain sufficient redress by an appeal to law. If so, of course the right of private defence is excluded by s. 99, cl. 3. It must not, however, be supposed that in cases not covered by this provision, the owner of the property is forbidden to protect himself. If a man, pretending a title to the goods or the house of another, attempts to take away his goods or to enter into possession of his house, the owner may ultimately beat him sufficiently to make him desist, but he may not do so at once. He must go through the various steps of requesting him to go away, and of gently laying his hands upon him to enforce his request. If, then, the trespasser turns upon him and assaults him, the owner may protect himself against the assault, in a manner proportioned to its severity; and if the trespasser has actually entered into his house, and the owner cannot otherwise retain possession, he may justify even a killing in self-defence. For the owner need not fly from his own house to avoid killing one from whose violence he cannot otherwise escape, for that would be to give up the possession of his house to his adversary by flight.[4] The English Commissioners say upon this point:[5] "But the defence of possession either of goods or lands against a mere trespass, not a crime, does not,

[1] *Reg.* v. *Guru Charan*, 6 B. L. R., App. 9; S.C. 14 Suth. Cr. 69.
[2] *Halloway's* case, 1 East, P.C. 237.
[3] *Reg.* v. *Scully*, 1 C. & P. 319.
[4] 1 Hale, P.C. 485, 486; 1 East, P.C. 272, 287.
[5] Report, 1878, p. 45.

strictly speaking, justify even a breach of the peace. The party in lawful possession may justify by gently laying his hands on the trespasser, and requesting him to depart. If the trespasser resists, and in so doing assaults the party in possession, that party may repel the assault, and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately said in 1 Rolle's Abridgment Trespass, G. 8, 'a justification of a battery in defence of possession, though it arose in defence of the possession, yet in the end it is the defence of the person.'" So Lawrence, J., said, "The defendant ought not in the first instance to begin with striking the plaintiff. But the law allows him, either in defence of his person or his possession, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery follows from the resistance."[1] Accordingly, mere resistance by a party lawfully in possession of land to an attempt made by others to expel him by force is lawful.[2] And where persons who were in peaceful possession of land were attacked by a party armed with sticks, who came to cut up the crops, and, there being no time to get the aid of the police, the persons in possession armed themselves with sticks, and a riot ensued, and one of the aggressors received a blow, from the effects of which he died; the prisoners were acquitted, it being held that the violence they had used did not exceed their right of private defence of property.[3] On the other hand, where there was a *bonâ fide* dispute about land between A and B, and B, with some of his people, began ploughing A's land by day; A, with a party armed with spears, came into the field, and, after a few words of remonstrance on either side, killed two of B's party, and wounded a third. These acts were held not justifiable under either ss. 100 or 104, as the act of ploughing under the particular circumstances did no harm, and could have been redressed by an appeal to the authorities; no effort had been made in a lawful way to induce the trespassers to retire, and no violence had been offered

[1] *Weaver* v. *Bush*, 8 T.R. 78; 3 Steph. Crim. L. 15.

[2] *Reg.* v. *Mitto Singh*, 3 Suth. Cr. 41; *Reg.* v. *Sachee*, 7 Suth. Cr. 112; *Reg.* v. *Tulsi*, 2 B.L.R., A. Cr. 16; S.C. 10 Suth. Cr. 64; *Birjoo Singh* v. *Khub Lall*, 19 Suth. Cr. 66; *Shunker Singh* v. *Burmah Mahto*, 23 Suth. Cr. 25; *Reg.* v. *Rajcoomar*, 3 Cal. 573, p. 584.

[3] *Reg.* v. *Guru*, 6 B.L.R., App. 9; S.C. 14 Suth. Cr. 29.

or threatened by them, to justify any such violence as was used.[1]

§ 221. It will be observed that the act which is forbidden in ss. 101 and 104 is "the voluntary causing of death." By s. 39, a person is said to cause death voluntarily, when he meant to cause it, or when he used means which to his knowledge are likely to cause it. A person who uses a deadly weapon, as a gun or a spear, will be held to have voluntarily caused death, if it follows from his act.[2] On the other hand, if a man, in defence of his person or property, knocks another down with his fist, or strikes him with an ordinary stick, and death ensues from some cause which could not have been anticipated, he has committed no offence.[3] The voluntary causing of death in self-defence, where the circumstances only justify the infliction of hurt falling short of death, is not murder, but culpable homicide, if the act is done in good faith—that is, for the purpose of self-protection, and in the belief that no other means will effect the purpose. For instance, if a man shoots another to prevent being horsewhipped.[4] But the killing of a person who is found committing a crime that would justify killing him in self-defence, will be murder if it is done vindictively and for revenge; as, for instance, where a person, finding a man in the act of committing housebreaking by night, called for a weapon for the express purpose of killing him, and did kill him; and it appeared that the housebreaker was at the time trying to escape, but probably would have been unable to escape, the High Court of Bengal ruled that the act was murder.[5]

§ 222. Where a person who is charged with injuring another pleads that he did it in self-defence, he must prove that a crime was actually attempted which would justify him in causing the particular hurt complained of, or that the facts were such as would justify a rational man in supposing that such an attempt was being made. Where a bailiff rushed into a gentleman's bedroom early in the morning, without announcing his character or purpose, the gentleman was held justified in inflicting the same, but no greater hurt, than would have been lawful if the man had

[1] *Reg.* v. *Gour Chand*, 18 Suth. Cr. 29. And see too, *Ganouri Lal Das* v. *The Queen*, 16 Cal. 206, p. 213.
[2] *Reg.* v. *Gour Chand*, 18 Suth. Cr. 29.
[3] *Reg.* v. *Knock*, 14 Cox, 1; *Reg.* v. *Mokee*, 12 Suth. Cr. 15.
[4] Section 300, Excep. 2. [5] *Reg.* v. *Durwan*, 1 Wym. Cr. 68.

been a mere wrongdoer.[1] In an old case, a gentleman was in possession of a room in a tavern, and several persons insisted on having it and turning him out, which he refused to submit to. Thereupon they drew their swords upon him and his companions, and he then drew his sword and killed one of them; this was held to be justifiable homicide; not that he would have been authorized to act in that way in maintaining his possession of the room, which might fairly be questioned, but because he might reasonably have thought that his life was in danger.[2] It is obvious, too, that a person who is living in a lonely house, or among a lawless population, or who is travelling by night on an unprotected road, is justified in acting upon appearances of danger which would be insufficient if he was dwelling in all the security of a civilized town.

§ 223. The right of defence begins when a reasonable apprehension of danger commences (ss. 102 and 105); that is, when there is a reasonable apprehension of such danger as would justify the particular species of defence employed. A man who is attacked by another who wears a sword is not justified in killing him on the chance that he may use the weapon, but if he sees him about to draw it, it is not necessary to wait till he does draw it.[3] So, a man who hears a burglar busy opening the lock of the house door, may fire at him before he gets in. But he would not be justified in firing at a man he saw prowling about his compound at night, unless he had reasonable grounds to suppose that the party was about to force his way into the house.

The right of defence ends with the necessity for it. Where the injury is to the person, the right ceases with the apprehension of danger (s. 102); that is, as said before, with the apprehension of such danger as would justify the particular form of violence employed in self-defence. Where a man is attacked by another with a sword, he is, as we have seen, justified in killing him. But if the sword is broken, or the assailant is disarmed, so that all apprehension of serious harm is over, the party attacked would be committing murder, or culpable homicide at the least, if he were still to proceed to the death of his opponent.[4] But a man who is assaulted is not bound to modulate his defence

[1] 1 Hale, P.C. 470; 1 East, P.C. 273.
[2] *Ford's* case, Kelyng, 51; 1 East, P.C. 243.
[3] See *Reg.* v. *Moizudin*, 11 Suth. Cr. 41.
[4] 1 East, P.C. 293.

step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable.[1] And, of course, where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.

§ 224. The right of defence against injuries to property is governed by the same principle, viz. the continuance of an injury which may be prevented (s. 105). Therefore, resistance, within the justifiable limits, may be continued so long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day. If, however, the property were found in his possession, the right of defence would revive for the purpose of its recovery. It by no means follows, however, that the right would revive to the same extent as it formerly existed at the commission of the original offence. Only such violence is lawful as would be justifiable against a person who has stolen property without intimidation; and if he resists by means which create no apprehension of death or grievous hurt, he cannot be killed, by virtue of anything contained in these sections. This is the ground of the distinction drawn in Explanations 2 and 3 between theft and robbery. In the former case, the right of defence appears to last longer than it does in the latter. What is meant is, that the right of defence against robbery, *as such*, only lasts as long as the robbery. While the fear of death, hurt, or wrongful restraint, which causes theft to grow into robbery (s. 309), continues, the offender may be killed. But when he takes to his heels with the booty the robbery is over, and the right of defence is reduced to what would have been admissible against a pick-pocket. A similar remark applies to Explanation 5. The right of defence against house-breaking as such, only lasts so long as the house-trespass

[1] Foster, Crim. L. 273.

continues—that is (s. 442), so long as the criminal is within the building. It would appear that if he died of a shot fired at him after he had effected his escape from the house, this would be an unlawful killing, though if he did not die, but was maimed for life, it would be all right (s. 104).

The same principle applies where the property is land. Where an unlawful entry is made upon land, the mere trespass as such (see *ante*, § 220) cannot be resisted with violence unless it is accompanied by some act which makes it punishable as mischief or criminal trespass.[1] And where the mischief has been completed, and there is no reason to apprehend a renewal of it, an attack upon the aggressors cannot be justified on the ground of self-defence.[2]

§ 225. Every person, by s. 97, is entitled to do, in defence of the person or property of another, any act which the person primarily concerned would be authorized to do for himself. The earlier English writers seem to have been inclined to limit this right to the case of persons who were in a sort of community of interest, as husband and wife, parent and child, master and servant, lodger and landlord, companion or neighbour. Lord Hale rests this right upon the general principle that "every man is bound to use all possible lawful means to prevent felony, as well as to take the felon; and if he doth not, he is liable to fine and imprisonment;" but he seems doubtful how far the rule would apply in favour of a mere bystander.[3] It is now, however, settled that on a fitting necessity every one may interfere.[4] A son was held excusable where he killed his own father, whom he honestly and reasonably believed was trying to kill the son's mother.[5] So, where a private person had broken into the house of another, and imprisoned him to prevent him killing his wife, Chambre, J., said, "It is lawful for a private person to do anything to prevent the perpetration of a felony.[6] It is obvious, however, that considerable caution would be required, where a stranger interfered in a matter the merits of which were not clearly beyond dispute. If he found two persons, A and B, engaged in a deadly struggle, the fact being that A would have been

[1] *Reg.* v. *Gour Chand*, 18 Suth. Cr. 29; *ante*, § 219.
[2] *Reg.* v. *Jeolall*, 7 Suth. Cr. 34.
[3] 1 Hale, P.C. 484.
[4] 1 East, P.C. 289, 292; Foster, Crim. L. 274.
[5] *Reg.* v. *Rose*, 15 Cox, 540.
[6] *Handcock* v. *Baker*, 2 B. & P. 260.

justified in killing B, while B was not justified in harming A, and if the stranger took the part of B, and killed or otherwise injured A, he certainly would not be justified by s. 97, as A was not committing any offence. He would have to fall back upon s. 79, and to urge that he was mistaken in the facts. It is quite clear that he would be justified in interfering to part the two, and would then be justified in his own defence in using any violence against either that was necessary for his own protection. But it is by no means clear that a man can rely on a mistake of facts, when he suddenly chooses one of two alternatives without any apparent reason for preferring one to the other.[1]

§ 226. A question that has been much discussed, and seems hardly settled, is, how far strangers are justified in interposing on behalf of one who is being arrested, or otherwise interfered with, by persons professing to act under legal authority, but who are not warranted in their action. In *Hugget's* case,[2] a man had been impressed, and was going quietly along with his captors. The defendant and others followed them, and asked to see their warrant, and, on being shown it, said it was no warrant, which appears to have been the fact. They then drew their swords to effect a rescue, and a scuffle ensued, in which one of the press-gang was killed. In *Tooley's* case,[3] a woman was being led away to prison as an improper character, without any proper warrant. She also was making no resistance. The defendant and others interfered in the same way. After she was lodged in prison, the same persons made a fresh attempt to rescue, with the same fatal result to one of the constables. In each case the judges were of opinion that the mere resistance to the officers was warranted by the illegality of their acts. They considered the killing to be manslaughter, apparently because the violence used was unnecessary; but only manslaughter, because the spectacle of an illegal arrest was provocation to all other men, not only the friends of the person who was arrested, but strangers.[4] In *Reg.* v. *Osmer*,[5]

[1] See 1 East, P.C. 290—292.
[2] Kelyng, 59; also at p. 136.
[3] 2 Ld. Raymond, 1296.
[4] See these cases discussed, Foster, Crim. L. 312—317; 1 Hawk. P.C. 103; 3 Steph. Crim. L. 71, where the latter author agrees with Foster in disapproving of Lord Holt's doctrine as to general provocation, except where the wrongful arrest causes a breach of the peace; Steph. Dig., art. 224c.
[5] 5 East, 304.

a man was being arrested under a good warrant by a constable who had no authority to execute it. The defendant and others assaulted and imprisoned the constable, and were convicted of an assault. The conviction was held bad. Lord Ellenborough, C.J., said: "If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose." In the cases of *Hugget* and *Tooley*, there had been no breach of the peace, as the persons arrested had submitted quietly, while in *Tooley's* case the arrest was completed. These cases were all relied on in the case of *Reg.* v. *Allen*, the whole facts of which will be found in Stephen's "Digest of the Criminal Law," pp. 366—374. There two men had been arrested on suspicion of felony, and were afterwards remanded from time to time on a warrant, which charged them generally with felony, but did not specify any particular offence. While the accused were being driven back to prison in the police van, a rescue was attempted by the prisoners, in the course of which one of the constables was killed. The prisoners were indicted for murder, and tried by a special commission, consisting of Blackburn and Mellor, JJ., before whom they were convicted and sentenced to death. The only defence was that the illegality of the arrest reduced the case to manslaughter. The prisoner's counsel applied to the judges to submit the case to the Court of Criminal Appeal. They refused, and their reasons were stated by Blackburn, J., in a letter which contained the following passage (p. 373): "The cases which you have cited are authorities that, where the affray is sudden and not premeditated, where, as Lord Holt says in *R.* v. *Tooley*,[1] it is acting without any precedent malice or desire of doing hurt, the mere fact that the arrest was not warranted may be a sufficient provocation. But in every one of these cases the affray was sudden and unpremeditated. In the present case the form of warrants adopted may be open to objection, and probably might, on application to the court for a writ of *habeas*, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale, that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and, consequently, is protected by it. This is a point which, had the

[1] 2 Ld. Raym. 1300.

affray been sudden and unpremeditated, we probably should have thought it right to reserve. In the present case, however, it was clearly proved that there was, on the part of the convicts, a deliberate, prearranged conspiracy to attack the police with firearms, and shoot them, if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to commit the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant,[1] and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter. To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the discharge of their duties, and by encouraging the lawless in a disregard of the authority of the law." It will be remarked that *Allen's* case differed from those of *Hugget* and *Tooley* and *Reg.* v. *Osmer* in this respect, that in it the constable was acting under a warrant which he was bound to obey; whereas, in the earlier cases, the constable had no legal authority whatever. But even if that difference had not existed, the remark that the prisoners well knew that the courts of law would set right any injury resulting from the illegality of the custody, would, under s. 99, cl. 3, be a complete answer to the plea of private defence.

§ 227. In all the previous observations, it has been assumed that the act which was resisted was in itself an offence. Section 97 has no application to any other case. There can, of course, be no resistance by way of self-defence to an act done by lawful authority, as the flogging of a convict under judicial sentence. Nor can there be any right of defence against an act which is itself an act of lawful self-defence. A gentleman, after vainly challenging another to fight, threw a decanter at him, which hit him on the

[1] See as to this point *Reg.* v. *Dadson*, 2 Den. C.C. 35; 20 L.J. M.C. 57; *ante*, § 152.

head, and at once drew his sword. The other retaliated with another decanter, which broke the assailant's head. The latter at once killed him with his sword. This was held to be murder, and neither to be justified nor extenuated by the blow which he had provoked and received.[1] So, if a robber or housebreaker by night is attacked in self-defence, and kills the person who attacks him, he cannot plead that he would otherwise have lost his own life, for this is one of the perils which the law attaches to his criminal act.[2] Where, however, the right of self-defence was being carried to an inexcusable excess, or was being enforced after the criminal attempt had been abandoned, there would, in theory at all events, be a right to resistance. I know of no such case having arisen; and in practice it would be difficult to make out. Where a fight takes place between two persons, whether by pre-arrangement or on sudden anger, each is acting unlawfully. In such a case the old books enter into the most minute discussion as to the circumstances under which either of the contending parties may rely on the right of self-defence.[3] The Draft Code of 1879 summarizes the views of the Commissioners in s. 56 as follows:—

"Every one who has without justification assaulted another, or has provoked an assault from that other, may, nevertheless, justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm: Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided, also, that before such necessity arose, he declined further conflict, and quitted or retreated from it as far as practicable.

"Provocation within the meaning of this section may be given by blows, words, or gestures."

The principles contained in this section appear to be

[1] *Mawgridge's* case, Kelyng, 119.
[2] 1 Hawk. P.C. 82; 1 East, P.C. 271.
[3] 1 Hale, P.C. 479, 482; 1 Hawk. P.C. 97; Foster, Crim. L. 277; 1 East, P.C. 279.

capable of application to cases such as I have suggested above.

Where an act of self-defence is being done under a misconception of facts, it may be lawfully resisted by the person whose action is misconceived, although the person who does the act is himself committing no offence (s. 98).

CHAPTER IV.

COMPLICITY WITH CRIME.

I. Joint Acts, §§ 229—232.
II. Abetment, §§ 233—242.
III. Concealment of Offences, §§ 243—246.
IV. Harbouring an Offender, §§ 247—251.
V. Screening an Offender, §§ 252—258.
VI. Corrupt Restitution of property, § 259.

§ 228. In this chapter I propose to examine various sections of the Code in which the accused, though he has not with his own hand committed the substantive offence, has become in a subordinate or secondary manner mixed up with it. Such modes of crime are treated in English law books under the head of principals in the first or second degree, and accessaries before or after the fact. In the Code they are dealt with according to the particular manner in which the defendant becomes associated with the crime.

There are four ways in which a person may become criminally responsible in respect of any offence: *First*, he may personally commit it. *Second*, he may share in the commission, though he does no personal act. *Third*, he may set some other agency to work with a view to the commission of the offence. *Fourth*, he may help the offender after the act, with a view to screen him from justice.

§ 229. **Joint Acts.** *First.*—No difficulty, of course, can arise under this head, where a single act is done by a single person. Where an offence is committed by means of several acts, whoever does any of these acts in furtherance of the common design, is guilty of the whole offence (s. 37). If one person steals goods in a house, and hands them to an accomplice outside, who carries them away, both are guilty of the theft.[1] If, however, the person outside knew nothing

[1] *Reg.* v. *Perkins*, 2 Den. C.C. 459.

of the intention to steal till the goods were handed to him, he could not be charged with the theft; his offence would be that of receiving stolen property.[1] On the other hand, two persons engaged in the same criminal act may be guilty thereby of different offences (s. 38). For instance, to take the last illustration; if the person who first removed the goods was the servant of the owner, he would commit an offence under s. 381, while the accomplice would only be punishable under s. 379. If, however, the accomplice knew that his associate was a servant, and urged him to steal his master's property, he would apparently, under s. 109, be liable to the aggravated penalty of s. 381.

§ 230. *Second.*—Where several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed, and ignorant of what is actually being done (s. 34). "Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him: some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise."[2]

§ 231. On the other hand, if several unite for the purpose of committing a particular offence, such as housebreaking, and in the committal of it one of the inmates of the house is killed, it does not necessarily follow that those who were watching outside would be guilty of murder. It would be a question of fact whether it was the common purpose of all, not only to break into and rob the house, but to effect their object by violence if resisted. If those who entered the house had arms, and were known by the others to have

[1] *Reg.* v. *Hilton*, Bell, C.C. 20.

[2] Foster, Crim. L. 350; *Ganesh Sing* v. *Ram Raja*, 3 B.L.R., P.C. 44; S.C. 12 Suth. P.C. 3.

them, such an inference would be legitimate.[1] The inference would, of course, be still stronger against those who were actually present when the violence was committed, though themselves unarmed. Where a number of persons combined to take a man by force to the tannah on a charge of theft, and some of them beat him on the way, Peacock, C.J., pointed out that while, on the one hand, it did not necessarily follow that the beating was part of the common design, so as to render those liable who were present, but did not join in the beating; so on the other hand, the fact that they were present and did nothing to dissuade the others from their violent conduct, might very properly lead to an inference that they were all assenting parties, and acting in concert, and that the beating was in furtherance of a common design.[2] Three soldiers went together to rob an orchard, two got upon a pear-tree, and one stood at the gate with a drawn sword. The owner's son coming by collared the man at the gate, and asked him what business he had there, upon which the soldier stabbed him. It was ruled by Holt, C.J., to be murder in him, but that the men on the tree were innocent. They came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. "It would," said he, "have been otherwise if they had all come thither with a general resolution against all opposers."[3] Here, it will be observed, the sword carried by the soldier was part of his everyday wear, and it does not appear that his companions knew he had drawn it. Still less can there be any joint liability where the act done by one is wholly foreign to the common purpose of all. Some soldiers who were employed in helping to apprehend a person, unlawfully broke open a house in which he was supposed to be, and some of them then stole some articles that were there. This was held only to be the offence of the actual thieves.[4] Nor, finally, can a mere bystander be liable for a crime committed in his presence, though he neither attempts to prevent it, nor gives information against the offenders.[5]

[1] *Dacres'* case, 1 Hale, P.C. 439, 443.

[2] *Reg.* v. *Gora Chand Gope*, B.L.R., Sup. Vol. 443; S.C. 5 Suth. Cr. 45.

[3] Foster, Crim. L. 353; see *Reg.* v. *Sabed Ali*, 11 B.L.R. 347; S.C. 20 Suth. Cr. 5.

[4] Anon. 1 Leach, 7, n.

[5] 1 Hale, P.C. 439; *Reg.* v. *Maganlall*, 14 Bom., p. 125; *Ishan Chandra* v. *Reg.*, 21 Cal. 262.

§ 232. Sometimes an act which is in itself lawful becomes unlawful, or *vice versâ*, if done with a particular intention or knowledge. The killing of a housebreaker found committing theft by night in a dwelling-house is lawful, but might be murder if he was killed out of mere revenge (*ante*, § 218). Carrying away the goods of another without leave is *primâ facie* theft, but may be only a civil trespass if they are honestly believed to belong to the taker. Now, if several persons join in either act, those who are honestly exercising their right of self-defence against the housebreaker will be innocent, those who are assaulting him from mere malice will be guilty. Those who carry away the goods under a claim of right will be innocent, those who know that there is no such right will be guilty. Each of the guilty parties will be guilty of the whole crime, though the deadly blow, or the actual removal of the property, was only the act of one (s. 35).

§ 233. **Abetment.**—*Third.*—A person who does not actually commit a crime may help to bring it about, and thereby be guilty of the offence of abetment, or, in the language of English law, be an accessary before the fact. He may do so in one or other of three ways: (1) By instigating it; (2) by engaging in a conspiracy to do it; (3) by aiding in the doing of it (s. 107).

1. A person instigates a crime who incites or suggests to another to do it, or who impresses upon his mind certain statements, whether true or false, with the intention of inducing him to commit a crime (s. 107, Explanation 1). A person who harps upon the real injuries which A has suffered from B, for the purpose of exciting A to revenge them; or a person who, knowing that B is about to have a private meeting with A's wife for some perfectly innocent object, suggests to A that there will be a criminal meeting between them, in the hope of causing A to commit violence upon B, will be guilty of abetting A in the crime to which he wishes to impel him; and it makes no difference that he does not in terms suggest that A should commit any unlawful act, or even that he affects to dissuade him from it. Not only a wilful misrepresentation, but also a wilful concealment of a material fact which he is bound to disclose, constitutes an abetment by instigation (s. 107, Explanation 1). The concealment must be prior to the commission of the offence, and must have a direct tendency to bring it

a person desiring, for purposes of plunder,

to cause the destruction of a train, were to conceal from the railway authorities the fact that a bridge had broken down a short distance ahead; this would be an abetment of any injurious consequences that might follow. And so it would be if a witness at a trial, in pursuance of a conspiracy to get an innocent man punished, were to conceal some material fact which he ought to disclose; the concealment of an offence after it has taken place cannot be said to cause or procure it to be done.[1] It is equally an offence to instigate A to instigate C, and so on indefinitely, provided the object is ultimately to arrive at somebody who will be influenced to the commission of a crime (s. 108, Explanation 4). But the mere refraining to dissuade another from the commission of a crime which he is contemplating, or even passively acquiescing in the idea, is not an abetment. "As if A says he will kill J.S., and B says, you may do your pleasure for me, this makes not B accessary."[2]

§ 234. The offence of abetment by instigation is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, or whether, having consented, he commits the crime. Nor does it make any difference in the guilt of the abettor that the agent is one who, from infancy or mental incapacity, would not be punishable; or that he carries out the desired object under a mistaken belief that the act he is employed to do is an innocent one; as where a mechanic is employed to make moulds for coining, without knowing the purpose for which they are to be used; or that he falls in with the plans of the abettor, knowing his criminal purpose, but intending to cause its detection.[3] The offence consists in the abetment. The consequences are only material as aggravating the punishment.

It is, however, necessary that the act abetted should be in itself an offence, although the person doing it may, from youth or other incapacity, be excused for the committal of it. A man was indicted for abetting a bigamy. The alleged bigamy consisted in the fact that he, being a Mahomedan and the guardian of a young girl, caused a marriage ceremony to be performed in her absence and without her knowledge, the effect of which was alleged to be that she, being already married before, became the wife of a second man.

[1] See *Reg.* v. *Rhadim*, 4 B.L.R. A. Cr. 7, which might be brought within s. 107, cl. 3, but not under Explanation 1; see *post*, § 238.
[2] 1 Hale, P.C. 616. [3] *Empress* v. *Troylukho*, 4 Cal. 366, s. 108.

It is evident that in this case, assuming that the ceremony did amount to a valid marriage, the girl could not possibly have been indicted under s. 494 in respect of an act of which she knew nothing. Therefore there was neither an offence nor an offender, and of course there could not be an abetment of that which did not and could not exist.[1]

§ 235. Lord Hale says:[2] "A commands B to kill C, but before the execution thereof, A repents, and countermands B, and yet B proceeds in the execution thereof. A is not accessary, for his consent continues not, and he gave timely countermand to B; but if A had repented, yet if B had not been actually countermanded before the fact committed, A had been accessary." This may be good English law, as depending on the peculiar relation of accessary and principal, which apparently must be in existence at the completion of the act. So, also, no one can be liable as accessary, unless a substantive felony has been committed. But the mere inciting of another to commit a crime is itself a misdemeanour by English law, though no offence is committed in pursuance of the incitement.[3] There seems to be no reason why this offence should be purged by repentance and countermand, any more than a theft is by restitution,[4] or a criminal conspiracy by withdrawal from it.[5] It is evident that the person incited might be much more powerfully influenced by the original instigation than by the subsequent repentance. Where the instigation is by letter, the abetment is not complete until the letter is read by the person whom it is intended to incite. If it never reaches him, or is handed over by him to some one else before reading it, the act is only an attempt to abet.[6]

§ 236. 2. A conspiracy is where two or more persons plan or act together to effect the commission of a crime.[7] It is not necessary that all the conspirators should be in communication with each other, or even that they should know of each other's existence (s. 108, Explanation 5). But they must all be acting in furtherance of a common object, and in accordance with the same concerted plan. So long.

[1] *Empress* v. *Abdool Kurreem*, 4 Cal. 10.
[2] 1 Hale, P.C. 618.
[3] *Reg.* v. *Higgins*, 2 East, 5; *Reg.* v. *Gregory*, L.R. 1 C.C. 77.
[4] 1 Hale, P.C. 533; 1 Hawk. P.C. 213.
[5] See *per* Coleridge, C.J., 21 Q.B.D., p. 549.
[6] *Reg.* v. *Ransford*, 13 Cox, 9.
[7] *post*, § 273.

as the conspiracy rests in mere plotting, it does not amount to an abetment under s. 107, cl. 2. Some act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing. The act done need not be in itself illegal, nor need the acts and omissions, taken together, go so far as an attempt (*post*, § 681); but they must amount to a preparation for the crime intended, sufficiently to show that there is a plan in actual progress. In this respect the law of the Penal Code seems to differ from the English law of conspiracy, where the offence consists in the mere unlawful combination, though nothing is done in furtherance of the common object.[1] "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it."[2]

§ 237. It has been laid down by the Calcutta High Court that a person cannot be convicted of abetment of a false charge, under ss. 109 and 211, solely on the ground of his having given evidence in support of such charge. The case was one referred by the sessions judge under s. 434 of the Crim. P.C., and in his letter of reference he made the following observations:—

"After careful consideration, I hold that s. 108 does not contemplate any acts of subsequent abetment, and that the Code does not provide for the puuishment of such offences, except when they are such as are defined in ss. 212 to 218 of Chap. XI. of the Indian Penal Code. Many very excellent reasons could be assigned for this apparent, though not real, omission. It will, however, suffice for the purpose of this reference to point out that if the inferior and theoretically less experienced criminal courts were allowed to punish as abettors persons who gave evidence in support of false charges, or rather charges found by the said courts to be false, the provisions of the Procedure Code by which the

[1] *Per* Coleridge, C.J., *Mogul Steamship Co.* v. *McGregor*, 21 Q.B.D., p. 549, approved in *Reg.* v. *Whitchurch*, 24 Q.B.D. 420; *Mulcahy* v. *Reg.*, L.R., 3 H.L., p. 317.

[2] Indian Evidence Act, I. of 1872, s. 10. See Illustration.

punishment of the crime of false evidence can only be inflicted by the Sessions Court would be practically neutralized and set at nought. It is, I think, obvious that this was never intended, and that the framers of the Criminal Procedure Code, although they allowed the lower criminal courts to punish for false charges, never vested them with authority to punish those who supported such charges, not by previous acts, but by evidence only." [1]

The High Court simply expressed their concurrence with the sessions judge, and set aside the sentence.

The decision was, no doubt, right in the particular instance stated. Where there was no case whatever against the prisoners, except that they had given evidence which the Court considered to be false, it is plain that they ought to have been charged with that as a substantive offence. It is an evasion of the law to twist a primary into a secondary offence, merely for the purpose of introducing a different jurisdiction, or a lower scale of punishment. Accordingly, in the case of *The Queen* v. *Boulton* and others, where the evidence, if believed, established the systematic commission of unnatural offences, while the Crown had limited the indictment so as only to charge a misdemeanour, Cockburn, C.J., directed the jury to acquit. But the reasons given by the sessions judge, and apparently concurred in by the High Court, seem to me to be of very questionable soundness. It is quite true that assistance given to another, subsequent to and independently of the substantive offence, does not amount to an abetment of it. But if the assistance was given as part of the original scheme for committing the offence, and for the purpose of furthering or facilitating it, the case would fall under the second and third clauses of s. 107. For instance, the mere harbouring of a murderer is punishable under s. 212, and not as an abetment of the murder. But if it were arranged that a murder should be committed at a particular place at night, and that the prisoner should leave his house door open so that the murderer might at once slip in and so escape observation, there can be no doubt that the proper way to charge the offence would be as an abetment. So, if it were determined to crush a particular man by a false charge, and the part of the plot assigned to one or more of the conspirators was the supporting of the charge by false evidence, there can be no doubt they would be legally punishable as abettors of an

[1] *Reg.* v. *Ram Panda*, 9 B.L.R., App. xvi.; S.C. 18 Suth. Cr. 28.

offence under s. 211. Nor is there anything conclusive against this view in the fact that the charge would be cognizable by a tribunal inferior to that which could try a charge of false evidence. Suppose the person who had actually preferred the charge had himself sworn to its truth. It could not be contended that this would be a ground for quashing his conviction under s. 211. If not, there is no greater anomaly in allowing his confederates to be indicted for abetting him. There might very well happen to be difficulties in procuring a conviction for giving false evidence, which would vanish if the charge were limited to one under s. 211.

§ 238. 3. A person abets by aiding, when by any act or illegal omission, done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof (s. 107, cl. 3, Explanation 2). Of course, mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. The priest who officiates at a bigamous marriage intentionally aids it, but not the persons who are merely present at the celebration, or who permit its celebration in their house, where such permission affords no particular facility for the act.[1] A debtor paid a sum of money and asked for a stamped receipt, but was unable to obtain one, the creditor having no stamp. He then accepted an unstamped receipt, saying he would affix a stamp, which he did not do. He was indicted for abetting, under s. 107, the offence of making an unstamped receipt. It was held that he could not be convicted. He had done nothing, and he had omitted nothing which it was in his power to effect.[2] On the other hand, a head peon who, knowing that certain persons would be tortured to confess, purposely kept out of the way, was held guilty of abetment.[3] The mere fact of supplying food to a person who is known to be about to commit a crime, is not necessarily an act done to facilitate its commission, unless such a supply was part of the arrangement by which the crime was to be effected.[4]

Abetting by illegal omission is the intentional abstaining from doing an act which it was the person's duty to do, and

[1] *Empress* v. *Umi*, 6 Bom. 126.
[2] *Reg.* v. *Mithu Lal*, 8 All. 18.
[3] *Reg.* v. *Kali Churn*, 21 Suth. Cr. 11.
[4] *Empress* v. *Lingam*, 2 Mad. 137.

which it may be assumed he would have done, if he had not wished to further the commission of the crime. For instance, wilfully withholding the information which every one is bound to give under ss. 44 and 45 of the Crim. P.C. (see *post*, § 245). So if a servant were intentionally to have a door unlocked, in order to facilitate the entrance of a burglar; if a nurse were intentionally to refrain from giving a sick man his medicine, in order to hasten his death. The intention is essential to make the omission amount to an abetment. Without that intention it may be punishable civilly or criminally, but not under s. 107.

Where the parties indicted as principal and abettor stand in the relation of master and servant, and where the acts of the latter are not in themselves unlawful, the guilt of each party will depend upon the knowledge and intention with which such acts were done. Where the keeper of a place of public resort left his premises in the management of a servant, and prostitutes were suffered to meet together and remain there, contrary to law; it was ruled, that if the servant, in knowingly suffering the prostitutes to meet together and remain, was carrying out the orders of his master, the master was guilty as a principal, and the servant as abetting.[1] And so the loading of his master's gun by a servant might be an innocent or a guilty act, according as he thought his master was going to shoot a tiger or to commit a dacoity.

§ 239. A person may abet the commission of an offence upon himself, provided he would have been criminally punishable if the offence had been completed. For instance, a woman may be punished for conspiring with others to cause herself to miscarry, for it is an offence in her, as well as in those who help her, if it is carried out.[2] But a girl under ten could not be charged for abetting a rape upon herself under s. 375, cl. 5, because the prohibition in the Penal Code is intended for her own protection, and does not contemplate her being punishable.[3] And so it is expressly provided by s. 497 that the wife shall not be punishable as an abettor of adultery with herself, she not being punishable under that section.

§ 240. The result of an abetment will be either that no

[1] *Wilson* v. *Stewart*, 32 L.J. M.C. 198.
[2] Section 312, *Reg.* v. *Whitchurch*, 24 Q.B.D. 420.
[3] See *Reg.* v. *Tyrrell* (1894), 1 Q.B. 310.

offence is committed, or that the offence is committed which was intended by the abettor, or that a different offence is committed. The mere abetment of an offence which comes to nothing is punishable by ss. 115 and 116, according to the gravity of the intended crime, and by s. 117 according to the number of persons who were instigated. When the crime proposed is actually accomplished, the abettor is treated as being equally guilty with the actual perpetrator, whether he were absent or present at the actual committing of the crime (ss. 109—114). The only case that ever creates any difficulty is the last, viz. where one offence is abetted and another is committed. In this case the abettor will not be answerable at all, if the offence is not committed in consequence of the abetment (s. 109, Explanation, s. 111). If a person, by suggesting to another a particular crime, simply rouses the criminal propensities of that other, the former is not responsible if those propensities break out in a different direction. If A incites B to gamble, he is not liable if B steals or commits breach of trust to supply himself with funds.[1] Nor would A be liable if he instigates B to commit a particular crime, and B commits a crime of the same sort, but different from the one suggested; as, for instance, if he incites him to kill X, or to break into and rob the house of Z, and B falls in with the general idea, but goes and kills Y, or breaks into his house. "A adviseth B to burn the house of C, which house B well knoweth. He spareth the house of C, and burneth the house of D. A is not accessary before the fact."[2] And so it would be if A advised B to steal the horse of C, and he steals his cow; or if he incited him to burn the house of C, and he killed C or robbed him; or to take C and carry him away, and if he robbed C of his jewels.[3] "But if the principal in substance complies with the temptation, varying only in circumstances of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessary before the fact (abettor), if present, a principal." As if A commands B to poison C, and he kills him with a sword. "So where the principal goes beyond the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such order or advice will be an accessary to that felony." For instance, if A

[1] Foster, Crim. L. 369. [2] Plowden, 475. [3] 1 Hale, P.C. 617.

incites B to burn the house of X, and any inmate of the house is burnt in it, or if the fire spreads to other houses. So if a Zemindar orders a number of his followers to arm themselves with clubs, and to take forcible possession of the lands of an adjoining proprietor, and a man is killed in the fight which ensues.[1] Whether a man who abets a robbery or a housebreaking will be criminally responsible if the person assailed resists and is killed, would depend upon the answer to this question: Was the mode in which the abettor advised that the crime should be effected, and in which he might reasonably have supposed that it would be effected, likely to result in such violence as might probably be followed by a death?[2]

§ 241. A case which has caused much difference of opinion among the English writers is this: If A incites B to kill X, and he by mistake kills Z, or aiming a blow at X kills Z, will A be guilty of murder? Lord Hale, following some earlier authorities, says A is not accessary to the murder of Z, because it differs in the person.[3] Foster says that the answer must depend upon whether the killing of Z was, or was not, the probable result of B's acting upon the instigation of A. If A tells B that X will pass a particular lonely place on his way home at night, and B waits for him there, and kills Z, whom he supposes to be X, Foster says that A is as guilty as B, and Sir James Stephen accepts that view.[4] Suppose that X really did come as expected, and was accompanied by Z, and that B fired at X, but killed Z, or that in attempting to kill X a fight ensued, in which B either intentionally or accidentally killed Z, I should think the same decision would be given. *Saunders's* case,[5] which was the source of this discussion, was as follows: Saunders wanted to kill his wife, and Archer advised him to put poison into a roasted apple and give it to her to eat. She ate part of it, and gave the rest to her child; Saunders was standing by, but was afraid to interfere, and the child ate the poison and died. Saunders, of course, was guilty of

[1] Foster, Crim. L. 369, 370; P.C., s. 113.

[2] See *Empress* v. *Mathura Das*, 6 All. 491, where Straight, Offg. C.J., took a more merciful view than the early English writers would have done. 1 Hale, P.C. 617; Foster, Crim. L. 370; Steph. Dig., art. 41, Illus. 2.

[3] 1 Hale, P.C. 617.

[4] Foster, Crim. L. 370; Steph. Dig., art. 41, illus. 1.

[5] Plowden, 475.

murder, but it was agreed by the judges upon conference that Archer was not accessary to the murder, it being an offence he neither advised nor assented to. Foster agrees with this decision, and distinguishes it from the first case put, because there was no mistake on the part of the father for which the adviser could be responsible; the father stood by, and suffered the child to eat the poison prepared for the mother. Sir James Stephen also adopts it.[1] It does not appear from the case whether Archer had understood and expected that Saunders would himself give the poison to his wife, and see that she ate it, and that nobody else did. If that were so, he would be protected by the terms of s. 111. If he advised Saunders to put poison in food prepared for her, and run the risk that no one else would take it, the case would come very near illustration (*a*) to that section. It is plain that in Foster's opinion the only thing which saved Archer was Saunders's presence, which thereby gave a definite direction to the poison which Archer had not intended.

§ 242. An abettor may succeed in rendering himself liable for two offences, when he only intended to bring about one, if the one which he intended causes another which he ought to have anticipated, and if they are both distinct offences, so as to be subject to distinct punishments (s. 112). He may even commit a more serious crime, and subject himself to a heavier penalty than his agent, who actually does the act. Suppose A, desiring to cause the death of X, tells B that he will find X in the bedroom of B's wife, and B rushes there, and finding X, kills him. The provocation might reduce the offence of B to culpable homicide not amounting to murder (s. 300, Excep. 1). A has received no provocation, and will be punished exactly as if he had induced B to kill any man in the street (s. 110).

Except that the mistake has actually been made, I should have thought it unnecessary to point out that a person who has been convicted of an offence, as principal, cannot also be punished for abetting it.[2]

§ 243. **Concealment of Offences.**—Sections 118, 119, 120, and 123 are all different forms of the same offence, viz. the case of a person who, intending to facilitate, or knowing that he will be likely to facilitate, the commission of an

[1] Foster, Crim. L. 372; Steph. Dig., art. 41, illus. 3.
[2] *Reg.* v. *Jeetoo*, 4 Suth. Cr. 23; *Reg.* v. *Ramnarain*, *ibid.* 37.

offence, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design. Of these sections all but s. 119 may be committed by any one, and only differ in regard to the gravity of the offence intended to be furthered. Section 119 can only be committed by a public servant, in respect to offences the commission of which it was his duty, as such public servant, to prevent. All the acts punishable under these sections would probably be acts of abetment under s. 107. I suppose the sections were inserted, *pro majori cautelá*, to include cases where the application of s. 107 was doubtful. The only difficulty that can arise as regards them is as to the meaning of the words "illegal omission." This means something different from the offence, now practically obsolete in English practice, of *misprision*, which is defined by Lord Hale as being "when a person knows of a treason or felony, though no party or consenter to it, yet conceals it, and doth not reveal it in convenient time." There was no such offence as misprision of a misdemeanour.[1] This offence assumed that the substantive crime had been already completed, whereas the illegal omissions in the sections under discussion are something antecedent to the commission of the offence, and intended to help in its execution.

§ 244. I think every public servant is under a legal obligation to disclose a design to commit any offences which would affect the particular state department to which he belongs. A policeman has a general duty to prevent all crime, and is therefore bound to give information of any crime which he may know to be contemplated.[2] In other branches of the public service the duty is more restricted: a soldier would be bound to give information of a design to mutiny, to attack military posts, to steal arms or ammunition. An officer in the customs, the stamp, salt, or opium department, would be bound to give notice of frauds going on or contemplated in those departments. So a revenue officer, in regard to frauds on the land revenue, or an officer of any court in regard to the funds in its custody. The same obligation, it seems to me, would attach upon an

[1] 1 Hale, P.C. 371, 374; 1 Hawk. P.C. 60, 73; Steph. Dig., note ix. 348.

[2] See Act XXIV. of 1859, s. 21; V. of 1861, s. 23; XVI. of 1873, s. 8; XV. of 1887, s. 6; Bombay Act, VIII. of 1867, s. 6.

officer of any private trading company, such as a railway or a bank. Possibly even upon private servants, as regards the particular sorts of property under their charge. The concealment of a design to commit an offence in reference to any subject-matter as to which the accused has a duty, for the purpose of facilitating commission of the offence, would almost necessarily be an abetment of it within s. 107, Explanation 1. The breach of this obligation would, at the very least, justify the summary dismissal of the offender, without notice and with loss of pay or pension, and this assumes that the act relied on as a justification is a breach of duty.[1] It would follow that such abstaining to give information for the express purpose of facilitating an offence, must be an illegal omission.

§ 245. There are also many cases in which the law imposes a direct obligation to give information of included crimes.

Under the Crim. P.C., it is enacted that—

44. "Every person aware of the commission of, or of the intention of, any other person to commit any offence made punishable under ss. 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148,[2] 302—304, 382, 392—399, 402, 435, 436, 449, 450, 456—460 of the Indian Penal Code, shall, in the absence of reasonable excuse, the burthen of proving which shall lie upon the person so aware, forthwith give information to the nearest police officer or magistrate of such commission or intention."

Any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460, shall be deemed to be an offence for the purposes of this section (Act III. of 1894, s. 1).

45. Every village headman, village accountant, village watchman, village police officer, owner, or occupier of land, and the agent of any such owner or occupier, and every officer employed in the collection of revenue or rent of land on the part of the Government or the Court of Wards, shall forthwith communicate to the nearest magistrate or to the officer in charge of the nearest police-station, which-

[1] See the definition of *illegal*, P.C., s. 43.

[2] These last five sections have been added by Act X. of 1894, s. 1.

ever is the nearer, any information which he may obtain respecting—

(*a*) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman, or police officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(*b*) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict, or proclaimed offender;

(*c*) the commission of, or intention to commit, in or near such village, any non-bailable offence, or any offence punishable under sections 143, 144, 145, 147 or 148 of the Indian Penal Code;

(*d*) the occurrence in or near such village of any sudden or unnatural death, or of any death under suspicious circumstances (Act X. of 1894, s. 2);

(*e*) The commission of, or intention to commit, at any place out of British India near such village any act, which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460 (Act III. of 1894, s. 2).

(*f*) Any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property, respecting which the district magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information (Act X. of 1894, s. 2).

In this section—

(*i*) "village" includes village-lands; and

(*ii*) the expression "proclaimed offender" includes any person proclaimed as an offender by any court or authority established or continued by the Governor-General in Council in any part of India, in respect of any act, which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399,

402, 435, 436, 449, 450, 457, 458, 459 and 460 (Act III. of 1894, s. 2).

Similar provisions are contained in the Lower Burmah Towns Act, IX. of 1892, s. 4.

§ 246. Under ss. 176 and 177, persons who are legally bound to give notice, or to furnish information to public servants, are punishable if they omit to give notice or information, or furnish false information, and special punishment is imposed if the information is required concerning the commission of an offence, or to prevent its commission, or for the apprehension of an offender. It has been held by the Madras High Court that the words "legally bound" in these sections must be taken in the sense defined by s. 43, as something which it is illegal to omit, and which illegal omission is an offence, or is prohibited by law, or would furnish ground for a civil action, therefore that it does not apply to omissions, which are merely a breach of departmental rules.[1] Sections 201—203 have special reference to similar offences, whose object is to prevent the detection of crime that has been actually committed (see *post*, §§ 336—338).

§ 247. **Harbouring.**—The fourth mode of criminal responsibility referred to in § 228, is where a person keeps the offender after the act, with a view to screen him from justice. A person who does so is called in England an accessary after the fact. In the Penal Code he is said to harbour an offender. By s. 212, whenever an offence has been committed, whoever harbours or conceals a person whom he knows, or has reason to believe to be the offender, with the intention of screening him from legal punishment, is liable to a punishment which varies according to that applicable to the offence of the person harboured. By s. 216, whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, is punishable in a similar manner. By s. 216A, whoever knowing or having reason to believe that any persons are about to commit, or have recently committed

[1] *Reg.* v. *Appayya*, 14 Mad. 484.

robbery or dacoity, harbours them with the intention of facilitating the commission of such robbery or dacoity, or of screening them from punishment, commits a punishable offence. Harbouring any officer, soldier, or sailor, in the army or navy of the Queen, who is known, or whom there is reason to believe, to be a deserter, is also an offence under s. 136. All these sections exempt from criminality the wife of the offender, when the harbour is given by her to her husband. No such exemption is to be found in s. 130, which relates to assisting a State prisoner, or prisoner of war, to escape, or rescuing him, or resisting his recapture, or harbouring or concealing hereafter his escape from lawful custody; nor in s. 157, where the person harboured is one who has been hired or engaged to join an unlawful assembly. Sections 225 and 225B provide for resistance or illegal obstruction to the apprehension of any other person for an offence, and for rescue or attempt to rescue from lawful custody for an offence. Aiding, or permitting the escape of offenders who have been committed to custody, is punishable under different circumstances by ss. 123, 129, 130, 221, 222 and 223.

§ 248. By English law a man can only be an accessary after the fact to a felony.[1] By the Penal Code any of the above acts are punishable where the person assisted is charged with any offence as defined in s. 40. And in cases within ss. 212 and 216, the word "offence" is extended to certain charges founded on acts which are crimes in British India, but which were committed out of it. The term "harbour," which was previously unexplained, is now defined by s. 216B, as including "the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in anyway to evade apprehension." This definition, however, is said to apply only to the use of the word in ss. 212, 216, and 216A. I cannot understand why it is not to apply to ss. 130 and 136, where the same word is used. Probably the omission is a mere oversight. The definition in 216B is itself a compendium of the principal acts which at common law rendered a man an accessary after the fact. Hawkins summarises them as follows:[2] "Any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which

[1] 1 Hale, P.C. 618.

[2] 2 Hawk. P.C. 445.

he is condemned, is a sufficient receipt for this purpose; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him. Also I take it to be settled at this day that whoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessary to the felony. Also some have said that all those are in like manner guilty who oppose the apprehending of a felon." It will be seen that under the Penal Code all the above acts are provided for under special sections.

§ 249. As, under English law, a man could only be accessary after the fact to a felony, it followed that the felony must have been actually committed and complete at the time he became an accessary. If a wound which was not a felonious act, was given to a man who afterwards died of it, one who harboured the person who gave the wound before the death occurred would not be an accessary after the fact.[1] Under the Penal Code, of course, the wound would itself be an offence, and harbouring the person who gave it would be punishable under s. 212, irrespective of the consequences which ensued. It would, however, be a matter of the greatest importance as to the form of the charge, and the penalty, whether the consequences had taken place at the time of the harbouring or not. If the death had actually taken place, and amounted to murder, the harbourer would be charged and punished under the first clause of s. 212. If it had taken place and amounted to culpable homicide not amounting to murder, he would be charged and punished under the second clause. If, however, the injured person was still living, the only offence then committed would be one of the forms of hurt, or negligence, and although, if the man subsequently died, his assailant might be guilty of the murder, the harbourer could only be convicted with reference to the offence which had actually been committed at the time of the harbouring; for this is the only offence which, under s. 212, he could have known, or have had reason to believe, the offender had committed. On the same principle there must have been an offence actually committed, and not

[1] 2 Hawk. P.C 448.

merely suspected to have been committed. A charge under s. 212 alleged that Sitaram had been murdered, and that the accused harboured Reoti, knowing, or having reason to believe, that Reoti was the murderer. It appeared that there was no proof that Sitaram's death was caused by the unlawful act of any person, and Reoti, when tried for murder, was unhesitatingly acquitted. It was held that a conviction for harbouring could not be sustained.[1] If, however, a warrant had been issued against Reoti, or if he had been taken into custody on a charge of murder and had escaped, the defendant might have been convicted under s. 216, though no offence had been committed in fact, provided he knew of the escape, or order for apprehension.

§ 250. Under s. 212 not only must it be shown that there was an offence committed, but that the accused had knowledge or information which would lead him to believe in the commission of the offence, and the guilt of the person harboured.[2] Suppose, however, that an offence had been committed, and that the accused harboured the offender, believing he had committed quite a different offence; as for instance, if a murderer asked for refuge in the defendant's hut, saying that he had assaulted a policeman, who was pursuing him. The defendant certainly could not be convicted under cl. 1 of s. 212, because he did not know or believe that the fugitive was a murderer. Nor do I think that he could be convicted under any other clause. It might be truly alleged that he harboured a person whom he supposed to have committed an offence punishable with two years' imprisonment under s. 353. But, then, no such offence had been committed, or could be alleged to have been committed.

§ 251. The act which is charged as harbouring must be something which is a personal assistance to the criminal himself. The mere receipt of the produce of a robbery is not such an act, however punishable it may be under other sections.[3] "But," Lord Hale says, "it seems to me that if B had come himself to C, and had delivered him the goods to keep for him, C knowing that they were stolen, and that B stole them; or if C receives the goods to facilitate the

[1] *Reg.* v. *Fateh Singh*, 12 All. 432.

[2] *Reg.* v. *Fateh Singh*, 12 All. 432; *Maturi Misser* v. *Reg.*, 11 Cal. 619, a decision on s. 201.

[3] 1 Hale, P.C. 619; *Reg.* v. *Chapple*, 9 C. & P. 355.

escape of B; or if C knowingly receives them upon agreement to furnish B with supplies out of them, and accordingly supplies them, this makes C accessary, for it is relieving and comforting." [1]

The acts which amount to harbouring must, under s. 212, be done with the intention of screening the offender from legal punishment, and, under s. 216, with the intention of preventing him from being apprehended. If a person from mere motives of humanity, and without any intention of enabling the fugitive to escape from justice, were to give food to a man who was starving, or surgical assistance to one who was wounded, even with a full knowledge of his character, it would seem that he had committed no criminal act.[2] In no case does mere omission amount to harbouring; as, for instance, failure to give information, or to levy hue and cry upon an offender, or to pursue him when hue and cry is levied, or to arrest him when there is an opportunity. Such omissions may be punishable as substantive offences (see ss. 176, 202), but they do not amount to harbouring under the Penal Code, nor did they make any one an accessary after the fact under English law.[3]

In England it has been held, "a man may make himself an accessary after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting him to escape." [4] Such conduct would, of course, be punishable under ss. 212 and 216.

§ 252. **Screening an Offender.**—Under s. 213, "whoever accepts, or attempts to obtain, or agrees to accept, any gratification (see s. 161, Explanation) for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing any offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment," is liable to penalties which vary according to those which may be awarded for the offence. Section 214 renders similarly punishable "whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any

[1] 1 Hale, P.C. 620.

[2] See the cases put, 1 Hale, P.C. 620, 621. They all, however, are cases of relief or assistance to a person who is actually in custody or out on bail.

[3] 1 Hale, P.C. 618, 619.

[4] Foster, Crim. L. 123.

person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment."

§ 253. It has been decided upon the analogous ss. 201, 203, and 212 and 216 (see *post*, §§ 335, 337, *ante*, §§ 249, 250), that it is essential to show that an offence was actually committed and not merely suspected. The same construction should obviously be put upon the word "offence" in ss. 213 and 214. The Madras High Court, however, has gone further, and has decided that in cases under ss. 213 and 214 it is necessary to show that the person whom it was intended to screen had actually committed the offence of which he was or might have been accused. The Court said: "As pointed out by Jackson, J., in *Reg.* v. *Joynarain Patro*,[1] we think the intention was to discourage malpractices where offences have been actually committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders."[2] In the case cited, which was brought under s. 203, Jackson, J., said nothing about offenders, but only that the lower court was wrong in holding that it was not necessary that the commission of any offence should be made out, so long as the party charged had reason to believe that the offence had been committed. He said: "In this opinion I am unable to agree. It appears to me that the object of the Legislature was not to insure general veracity, or the making of correct statements in regard to supposed offences, or to offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which had been actually committed, and which the person charged knew or had reason to believe had been actually committed." The Madras Court also relied upon three other decisions,[3] and considered that the construction placed by them upon similar words in s. 201 applied to s. 214 also. But those decisions also referred to nothing beyond what had been settled in *Joynarrain's* case; they did not touch the point now under discussion. On the

[1] 20 Suth. Cr. 66.

[2] *Reg.* v. *Saminatha*, 14 Mad. 400.

[3] *Reg.* v. *Abdul Kadir*, 3 All. 279; *Reg.* v. *Fateh Singh*, 12 All. 432; *Matuki Misser* v. *Reg.*, 11 Cal. 619.

other hand, it has been held in two cases in Calcutta[1] upon ss. 201, 217, and 218, that the guilt of the person screened was immaterial. In s. 201 the words are "causing evidence to disappear with the intention of screening the offender from legal punishment." In ss. 217, 218, public servants are punishable if they do certain acts "with intent to save any person from legal punishment." Upon all these sections it may well be that the Legislature does not concern itself with cases where no offence has been committed. But where there has been an offence, it is a matter of public interest that it should be fully investigated, and that all charges against persons reasonably suspected should be inquired into. If a person who is in possession of information pointing to the guilt of a particular individual, consents from corrupt motives to keep back his knowledge, or to stifle a prosecution against him, this is itself a grave offence against public justice.[2] It is difficult to see how this offence can depend upon the fact that the guilt of the person screened from justice cannot be proved, or even that he is subsequently tried and acquitted. Either of these results may follow from the very conduct which is charged under ss. 213 or 214. It would be curious if that which constitutes the evil should condone the offence.[3]

§ 254. The stat. 18 Eliz., c. 5, s. 4, rendered it a punishable offence, "if any person by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward." Upon this statute, which was passed to discourage malicious informers on penal statutes, and to provide that offences, when once discovered, should be duly prosecuted, it has been decided that the offence of compounding a charge is complete, whether the person from whom money has been taken could or could not have been convicted.[4] This shows that the offence is complete as soon as a corrupt agreement has been made, or attempted, to suppress evidence which might result in the detection of crime. Accordingly, it has been

[1] *Reg.* v. *Hurdut Surma*, 8 Suth. Cr. 68; *Reg.* v. *Amirruddeen*, 3 Cal. 412.

[2] Also all who endeavour to stifle the truth and prevent the due execution of public justice are highly punishable, as those who dissuade, or but endeavour to dissuade, a witness from giving evidence against a person indicted (1 Hawk, P.C. 64).

[3] See as to the analogous ss. 201, 202, 203, *post*, §§ 336—338.

[4] *Reg.* v. *Gotley*, Russ. & Ry. 84; *Reg.* v. *Best*, 2 Moody, 124.

held in England, that where such a corrupt agreement has been made, the offence is not altered by the fact that the person making it afterwards prosecuted the criminal, and procured his conviction.[1]

§ 255. The exception to s. 214 provides that the provisions of ss. 213 and 214 do not apply to any case in which the offence may lawfully be compounded. The whole law as to compounding offences is now laid down by s. 345 of the Crim. Procedure as follows:—

The offences punishable under the sections of the Indian Penal Code described in the first two columns of the table next following, may be compounded by the persons mentioned in the third column of that Table:—

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358.	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.

[1] *Reg.* v. *Burgess*, 16 Q.B.D. 141.

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Criminal Breach of Contract of Service	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with a criminal attempt a married woman	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years ...	506	The person intimidated.

The offence of voluntarily causing hurt, voluntarily causing grievous hurt, causing hurt by an act which endangers life, or causing grievous hurt by an act which endangers life, punishable under ss. 324, 335, 337, or 338 of the Indian Penal Code, may, with the permission of the court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot, or a lunatic, any person competent to contract on his behalf may compound such offence.

The composition of an offence under this section shall have the effect of an acquittal of the accused.

No offence not mentioned in this section shall be compounded (s. 345).

§ 256. In a case under the Criminal Procedure Code of 1872, a man was convicted of adultery at the suit of the husband. After his conviction, and pending an appeal by him to the High Court, the husband took back his wife, and at the hearing of the appeal applied for leave to the court to compound the offence. The High Court considered that leave to compound could not be given at that stage of the proceedings, but under the circumstances of the case directed the release of the prisoner, considering that he had been sufficiently punished.[1] Under s. 345 of the Crim. P.C., I imagine the compounding must be before trial. It is to be treated as an acquittal, and must be pleaded as such when the prisoner is put on his defence. Compounding between the parties cannot operate as an acquittal of a person who has been convicted. There is no longer anything to compound, as the offence is merged in the conviction and the sentence following upon it, and of this the record is conclusive proof.

§ 257. Where a person who is charged with an offence pleads that it has been compounded, it lies upon him to prove that there has been a composition which is valid in law. In general, the person compounding the offence receives some gratification, not necessarily of a pecuniary character, as an inducement. Probably such an agreement would not come within the provisions of the Contract Act, s. 25, as to the necessity for consideration, but the proof of the arrangement must be similar to that which the court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind, and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Accordingly the plea that an offence was compounded, in a case where a planter had acted illegally to some coolies, was held not to be established by

[1] *Reg.* v. *Thomson*, 2 All. 339.

a document signed by the coolies, for which no motive was shown, and which it did not appear that they thoroughly understood.[1]

§ 258. In the trial of summons cases under Chapter XX. of the Criminal Procedure, it is provided by s. 248 that if a complainant, at any time before a final order is passed in any case under this chapter, satisfies the magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

On the trial of warrant cases under Chapter XXI., s. 259 of the Code provides that when the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent and the offence may be lawfully compounded, the magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

When this course has been taken the discharge of the accused does not operate as an acquittal, and the proceedings may afterwards be revived if it is thought necessary.[2]

By s. 494, any public prosecutor appointed by the Governor-General in Council or the Local Government may, with the consent of the court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person; and, upon such withdrawal,

(*a*) if it is made before a charge has been framed, the accused shall be discharged;

(*b*) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

In cases of contempt of the lawful authority of a public servant, the complainant is the public servant whose authority has been resisted, and not the private person injured by the resistance. The withdrawal, therefore, of such a charge must be based upon the application of the public servant resisted, or of the authority who sanctioned the proceedings.[3]

§ 259. **Corrupt Restitution of Property.**—By s. 215 of the Penal Code, whoever takes, or agrees or consents to take,

[1] *Murray* v. *Reg.*, 21 Cal. 103.
[2] *Reg.* v. *Devamma*, 1 Bom. 64, decided on s. 215 of Crim. P.C. of 1827.
[3] *Reg.* v. *Muse Ali*, 2 Bom. 653.

any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section is borrowed from a series of English statutes, the first of which, 4 Geo. I., c. 11, s. 4, was passed to put a stop to the trade of the notorious Jonathan Wild, who was ultimately convicted under it and executed.[1] The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and, knowing the criminal, makes a profit out of the crime, while screening the offender from justice. It is not an offence to take money from another in order to help him to find the property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. It is an offence for one who is mixed up with the original crime to receive or to bargain for money as a reward for the restitution of the property.[2] It is also an offence to assist the owner of stolen property to purchase it back from the thieves, not meaning to bring them to justice.[3] And the offence is equally committed where a person has accepted or bargained for any gratification under pretence of helping the owner to goods stolen from him, though the prisoner had no acquaintance with the thief, and did not pretend that he had, and though he had no power to apprehend the original criminal, and though the goods were never restored, and the prisoner had no power to restore them.[4]

Section 215 only applies to persons who receive or bargain for money, for the purpose of helping another to recover property which has been unlawfully taken; but, of course, any one who instigates such an offence will be punishable as an abettor. Great caution will, therefore, be necessary in offering rewards for the recovery of stolen property.

[1] 2 East, P.C. 770.
[2] *Reg.* v. *King*, 1 Cox, 36.
[3] *Reg.* v. *Pascoe*, 1 Den. 456; S.C. 18 L.J. M.C. 186.
[4] *Reg.* v. *Ledbitter*, 1 Moody, 76.

Under 9 Geo. IV., c. 74, s. 112, now repealed, it was made an offence to publish any advertisement for the return of property, where any words are used purporting that no questions will be asked, or that a reward will be paid without seizing, or making an inquiry after, the person producing such property. The spirit of this Act will probably guide the courts if any indictment is preferred for abetting an offence under s. 215. Every such advertisement should stipulate for such information as may lead to the apprehension of the criminal.

CHAPTER V.

OFFENCES OF A PUBLIC CHARACTER.

First.—Offences against the State, §§ 260—281.
I. Waging War against the Queen, §§ 264—271.
II. Conspiring against the Queen, §§ 272—276.
III. Seditious Language, §§ 277—281.
Second.—Offences against Public Tranquillity, §§ 282—295.
I. Unlawful Assembly, §§ 282—291.
II. Rioting, § 292.
III. Turbulent Assemblies, §§ 293, 294.
'. Affray, § 295.

§ 260. **Offences against the State.**—Chapter VI. of the Code deals with offence against the State in its corporate capacity; that is, offences which attack the existence or constitution of the State itself, as distinguished from those acts which are offences against the State by reason of their injurious effect upon the subjects. Of these, sections 121, 121A, and 124A are those which alone require any detached notice.

First of all as to their application. It will be observed that the general word "whoever" which commences each section makes no distinction as to nationality. Every person who, being within the jurisdiction of the Indian Government, makes any attempt to overthrow it or its allies, is equally guilty. This was expressly intended by the framers of the Code,[1] and is in accordance with the law of England, and indeed of every other country. In 1781, one De La Motte, a Frenchman resident in England, was indicted for holding treasonable communications with the French Government. Buller, J., in sentencing him, said, "During your residence in this country, as well as during the course of the trial, you have received the protection of the laws of the land; as such you owe a duty to those laws,

[1] Second Report, 1847, s. 13, p. 343.

and an allegiance to the King whose laws they are."[1] The same rule applies to those foreigners who have only entered the country for the purpose of attacking it. "An alien enemy, if he comes into the realm, does not owe any allegiance, and cannot be indicted for treason, but shall be punished by martial law."[2] But this is only true as regards aliens, who belong to a nation which is actually at war with Great Britain. In 1837–38 a rebellion took place in Canada, and a number of citizens of the United States crossed the border in arms, to assist the rebels. They were defeated, and some remained as prisoners in the hands of the Canadian Government, who felt a difficulty as to the mode of dealing with them. The question was referred to the English law officers (Sir John Campbell, afterwards Chief Justice and Chancellor, and Sir R. M. Rolfe, afterwards Lord Cranworth, Chancellor), and they advised unhesitatingly that the prisoners should be tried for treason in the ordinary courts. They said, "An alien enemy occupies a portion of the British territory, as the territory of his own sovereign; the laws of his own country are supposed to prevail there, as far as he is concerned, and he owes exclusive and undivided allegiance to his own sovereign. If he is captured, he is to be treated as a prisoner of war; he can in no shape be tried as an offender for any act of hostility in which he may have participated. An alien *amy* is subject to the law of the country where he is, and he cannot be permitted, without authority from his own or any foreign Government, to absolve himself from this obligation by saying that he entered the country as an enemy. He cannot claim to be treated as a prisoner of war, or to be ransomed or exchanged."[3]

§ 261. If an alien whose sovereign is at war with Great Britain chooses to live in British territory, he is under the same obligation to allegiance as if the two countries were at peace. For he accepts a protection, which carries with it the obligation to obey. In 1707, when England was at war with France and Spain, the judges assembled to consider such questions by the Queen's command, and laid down the further rule, that "if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war in his native country, go thither, and there

[1] *R.* v. *De La Motte*, 21 St. Tri. 687, at p. 814.
[2] 1 Com. Dig. 554, citing *Calvin's* case, 7 Rep. 6*b*.
[3] Forsyth, 200.

adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued under the same protection."[1]

§ 262. A different case arises where a British subject is captured among the armed forces of a lawful belligerent. When Wolfe Tone fell into the hands of the Irish Government under the circumstances already detailed (*ante*, § 100), he appears to have claimed a different treatment from that of an ordinary rebel, on the ground that he held a commission as an officer in the invading force from the French Government. He committed suicide before that, or any other point, could be raised on his behalf. It is clear, however, that it could not have availed him. In the days of Queen Elizabeth Dr. Story was indicted for treason. It was admitted that he had been born in England, but he pleaded that he was, and had been for seven years, a subject and serjeant of the King of Spain. The plea was held bad.[2] In the rebellion of Prince Charles in 1745, Macdonald was captured, and tried for treason. He pleaded that he was born in France, which would have been a good defence, but was found against him. He admittedly had lived from childhood, and been educated in France, and he held a French commission, dated 1st June, 1745, which appointed him commissary of the troops of France, which were then intended to embark for Scotland, France and England being at the time at war. These facts were held to be no defence. The Court said, "It never was doubted that a subject born, taking a commission from a foreign prince, and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. It was so ruled in *Dr. Story's* case; and that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown."[3]

§ 263. As regards naturalization abroad, the law has been altered by stat. 33 & 34 Vict., c. 14, s. 6, which provides

[1] Foster, Crim. L. 185. [2] Dyer, 300, *b*.
[3] Foster, Crim. L. 59.

that "any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State, and not under any disability, voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien." It will be observed that it is not sufficient that he should have adopted the foreign country as his permanent residence, so as to be domiciled there. That is quite consistent with his continuing to be a British subject. He must, by a formal act, have been accepted by the foreign country as its subject, for whose acts they become responsible.

Further, "when by treaty, especially if ratified by Act of Parliament, our Sovereign cedes any island or region to another State, the inhabitants of such ceded territory, though born under the allegiance of our King, or being under his protection while it appertained to his Crown and authority, become effectually aliens, or liable to the disabilities of alienage, in respect of their future concerns with this country."[1]

§ 264. **Waging War against the Queen**, with its various phases of actually waging war, attempting to wage it, abetting the waging of it, or making preparations to wage it, are offences punishable under ss. 121 and 122. Concealing the existence of a design to wage war against the Queen, in order to facilitate such war, is punishable by s. 123, while s. 125 contains provisions similar to those of s. 121 as regards the waging of war against any Asiatic power in alliance or at peace with the Queen. In all these sections the only difficulty is as to the meaning to be attached to the words "waging war." The phrase used in the English statute of treasons, 25 Edw. III., stat. 5, c. 2, is "levying of war," which seems exactly synonymous with the terms of the Penal Code. Did the framers of the Code intend to use an equivalent to the English term, which should be subject to the well-known judicial construction placed upon it, or did they adopt a different wording so as to escape from that construction, and if so, what is the construction they intended?

The Indian Law Commissioners in their second report, 1847, ss. 9, 10, p. 342, refer with approbation to the language

[1] 1 Bac. Abr. 168.

of the English Criminal Law Commissioners in their sixth report. "The crime," they say, "is in plain and unambiguous terms declared by the statute to consist in a levying of war. There is nothing to indicate that these terms were intended to be used otherwise than according to their literal sense, and, indeed, the context, as well as the history of the times antecedent to the declatory Act, confirm the position that they were meant to be used in that sense. After much reasoning on the subject they say in conclusion, "Under these impressions we are inclined to recommend that the use of all constructive interpretations of the statute of treasons, both in the article of levying war and of compassing the King's death, should be abolished by the Legislature; and we have accordingly inserted in the Digest provisions which will have the effect of excluding them." In another place the Commissioners say, "The terms of the statute seem naturally to import a levying of war by one who, throwing off the duty of allegiance, arrays himself in open defiance of his Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the State. So also we conceive the terms 'waging war against the Government' naturally import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do; and it seems to us, as we presume it did to the authors of the Code, that any definition of terms so unambiguous would be superfluous."

§ 265. Judging from these extracts, it would appear that the Indian Law Commissioners accepted the phrases "levying war" and "waging war" as identical in meaning, and thought that no sensible man could mistake the meaning of either phrase, if he kept in mind that a social and an international war were both alike in their manner and their means. With great respect to both sets of Commissioners, it appears to me that this is a fallacy. So far from being alike, the two sorts of war have nothing in common except that they are both carried out by violence; they differ in their methods and in their aims. The social war has neither the legal origin nor the organized procedure of international war. It always begins in mere local disturbance. The most successful rebellion of modern days, that which produced the United States of America, commenced in a series of riots no way distinguishable from the Gordon riots of 1780, or the Bristol riots of 1831.[1] If it is not

[1] Lecky, History of England, iii. 329.

checked it matures into rebellion, and culminates in civil war. Again, the object of international war is to subdue the State but to preserve the Government. The object of rebellion is to overthrow the Government, in order to get possession of the State. The former unites society, the latter dissolves it. Every day that a rebellion continues it is strengthened by new recruits, and the power of the Government is weakened. The governor who waits to recognize a rebellion till it looks like a war, will probably find that he has waited too long. That which distinguishes a riot, which is the beginning of waging or levying war, from a riot which will end in plunder and broken heads, is the object with which it is started. That is the principle of English law, and although the application of the principle is always difficult, and has often been too severe, it seems to me that the principle itself is sound, and that there is no country in which it is so necessary to enforce it as in India.

§ 266. The material parts of the statute of Edward III., the whole of which is set out in 1 Hale, P.C. 89, are as follows: "Whereas divers opinions have been before this time in what case treason shall be law, and in what not, the King, at the request of the lords and of the commons, hath made a declaration, in the manner as herein followeth; that is to say, when a man doth compass or imagine the death of our lord the King;" "or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere;" "it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason." "And if *per case* any man of this realm ride armed covertly [in the original *descovert*, which, as Sir James Stephen points out,[1] should be translated 'overtly' or 'openly,' not 'covertly'], or secretly with men of arms against any other to slay him, or rob him, or take him, or retain him, till he hath made fine or ransom for to have his deliverance, it is not the mind of the King nor of his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old time used, and according as the case requireth."

The invariable construction put upon this statute, which was itself declaratory of the common law, has been, that no

[1] 2 Steph. Crim. L. 269.

acts, however violent or lawless, even if they took the form of open war between two great nobles, or insurrection by the commonalty,[1] amounted to a levying of war against the King, where the object was to procure some private advantage or to redress some private injury. To make out the offence, it was necessary to show that the distinct object aimed at was, either directly to overthrow the authority and power of the Sovereign, or to do so indirectly by coercing the Sovereign and his advisers into adopting some different policy, or passing or repealing some law in a matter of general concern. The judges considered that those who, by violence or intimidation, compelled the Sovereign to do that which he would not otherwise have done, overthrew his authority, and possessed themselves of it, exactly as if they had formally deposed him from his throne. Any acts of violence intended to have this effect were held to be a levying of war against the King.[2]

§ 267. In earlier times it is probable that this principle was strained to meet cases, which would now be charged only as riots and unlawful assemblies. In *Messenger's* case, in 1668,[3] where a mob pulled down a number of brothels, under colour of reforming them, and resisted the troops who were brought out against them; and in *Dammaree's* case, in 1710, where the mob, during the Sacheverell riots in Queen Anne's reign, destroyed numerous meeting-houses, the offenders were held guilty of levying war against the King. In the latter case, Parker, C.J., said, in reference to the case of the brothels: "If it be a particular prejudice to any one, if he himself should go in an unlawful manner to redress that prejudice, it might be only a riot. But if he will set up to pull them all down in general, he has taken the Queen's right out of her hand. This is a general thing, and affects the whole nation."[4] The most authoritative

[1] See 1 Hale, P.C. 140, 143.

[2] 1 Hale, P.C. 133—146; Foster, Crim. L. 208—211. The language of Mr. Justice Foster has always been adopted in subsequent cases, and was read out to the jury as an authoritative exposition of the law by Lord Loughborough in cases arising out of the Gordon riots (21 St. Tri., p. 490), and by Tindal, C.J., in *Frost's* case (9 C. & P., p. 161).

[3] Kelyng, 70; 6 St. Tri. 879. Hale, C.B., differing from all the other judges, thought the offence was a misdemeanour only. Lord Campbell, in his "Lives of the Chief Justices," i. 508, heaps ridicule upon the decision, and upon Chief Justice Kelyng, who pronounced it.

[4] 15 St. Tri. 522, pp. 606—609.

cases of modern times are those of Lord George Gordon and of Frost.[1]

§ 268. The Gordon riots, in 1780, originated in the passing of an Act for the relief of Roman Catholics in England from political disabilities. The proposed extension of this Act to Scotland had led to a series of outrages against the Papists in Edinburgh and other towns, which induced the Government to abandon their intention. Encouraged by this success, a body called the Protestant Association in England was formed for the purpose of repealing the English Act, and Lord George Gordon, who had been active at the head of the malcontents in Scotland, was chosen their president. The first step was the preparation of a petition to Parliament for the repeal of the obnoxious law, which was presented by Lord George Gordon, backed by about ten thousand men, who marched in three organized bodies. When they arrived at Westminster the mob insulted and maltreated the members of both Houses as they arrived, when they were known to be of the party who favoured the Catholics, and tried to force them to promise that they would vote for the repeal of the Act. They waited outside the House till the petition was rejected, and then proceeded to demolish some Roman Catholic chapels. For nearly a week the riots continued, the principal object of attack being Catholic chapels and the houses of prominent Catholics and persons known to be in their favour. The gaols were burnt down and the prisoners released.[2] Lord George Gordon was indicted for his part in these proceedings, and was charged with levying war against the King. The case against him was that he had instigated the mob who followed him to Westminster to intimidate the members of both Houses, in order to repeal the Act, and that he had further incited the rioters to commit the subsequent excesses for the same purpose. Erskine, who defended him, did not dispute that such a case, if made out, would have been a levying of war under the statute, but he denied that he had taken part in the riots beyond the lawful act of presenting a petition to Parliament. He was acquitted by the jury. Lord Mansfield, C.J., laid down the law very much in the

[1] The Bristol riots of 1831, though they originated in a lawless demonstration of the reforming party against the Tory Recorder, Sir Charles Wetherell, were not aimed at effecting any political object. See Ann. Reg. of 1831, pp. 291—294.

[2] Ann. Reg. of 1780, 254—262.

language of Mr. Justice Foster.[1] He said: "There are two kinds of levying war—one against the person of the King: to imprison, to dethrone, or to kill him, or to make him change measures or remove counsellors; the other, which is said to be levied against the majesty of the King, or, in other words, against him in his legal capacity—as when a multitude assemble to attain by force any object of a general public nature; that is levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government, and by force of arms to restrain the King from reigning according to law." "In the present case, it does not rest upon an implication that they hoped by opposition to a law to get it repealed, but the prosecution proceeds upon the direct ground, that the object was, by force and violence, to compel the Legislature to repeal a law; and, therefore, without any doubt, I tell you the joint opinion of us all,[2] that if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to repeal a law, that is high treason."

§ 269. Frost was a leader of the Chartists, who were associated for the purpose of procuring various constitutional changes. In 1840 he and others concerted a rising in Wales. Three bodies of armed men were to attack the town of Newport, overcome the military, stop the mails, and then signal to Birmingham, where a similar rising was to take place. It was expected that the insurrection would spread over the north of England, and then chartism was to be proclaimed the law of the land. Nothing was contemplated by chartism beyond six changes in the constitution of Parliament; three of which have already been granted, and no one of which was inconsistent with a reasonable government by King and Parliament. The attempt was made as planned, but failed, and Frost, with two other ringleaders, were indicted for levying war against the Queen.[3] The defence was, that the insurrection was only intended for the purpose of releasing some Chartists, who were imprisoned at Westgate, and procuring better treatment for another who was in prison at Monmouth. Tindal, C.J., in summing up the case to the jury, after reading Foster Crim. L., pp. 210

[1] 21 St. Tri. 486, at p. 643. [2] Willes, Ashurst, and Buller, JJ.
[3] The case is badly reported in 9 C. & P. 129; the report in 4 St. Tri. N.S. 86 is full and accurate.

and 211, said: "So that I think the rule of law may be laid down in a few words in this manner: To constitute a high treason by levying war, there must be insurrection; there must be force accompanying that insurrection, and it must be for the accomplishment of an object of a general nature. But if all these circumstances are found to concur in any individual case, that is quite sufficient to constitute a levying of war." As to the defence that was suggested, he said, that if it were made out, the acts proved would be deficient in the main ingredient of the offence of levying war against the Queen within her realm; it would want the compassing and designing to put down the authority of the Queen.[1]

§ 270. It will be observed that Chief Justice Tindal speaks of "force accompanying an insurrection," not of an armed or military insurrection. Mr. Justice Foster notices a distinction taken by Hale,[2] "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly, tumultuous assemblies, which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary show and apparatus of war before mentioned." Upon this he says, "I do not think any great stress can be laid upon that distinction;" and points out the absence of such circumstances in cases which had been held to amount to a levying of war. "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature proper for the mischief they intended to effect—*Furor arma ministrat.* The true criterion therefore in all these cases is, *Quo animo* did the parties assemble?"[3]

As the specific intention is the essence of the offence of levying war, it must be made out by the prosecution. It may be inferred from the acts proved and from the statements accompanying them, but the Crown is bound to make out a complete case. The prisoner cannot be called on to prove his intentions.[4] But, of course, in this, as in all other cases, if the prosecution has made out a case which is sufficient in itself, if there is other evidence which would

[1] 4 St. Tri. N.S., pp. 439—443.
[2] 1 Hale, P.C. 131.
[3] Foster, Crim. L. 208.
[4] *Frost's* case, 4 St. Tri., p. 47; *ante*, § 269.

refute the presumption so raised, it must be produced by the defence.

§ 271. Levying war as one of the branches of high treason is defined by the English Commissioners in the following section, which in their Report of 1879, p. 19, they say, "exactly follows the existing law."

Section 75 (*f*). Levying war against Her Majesty either with intent to depose Her Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of Her Majesty's dominions or countries; or, in order, by force or constraint, to compel Her Majesty to change her measures or counsels, or in order to intimidate or overawe both Houses, or either House of Parliament.

This agrees substantially with the definition given by Lord Mansfield of levying war against the person of the King.[1] It must be remembered that in the time of Edward III., and very long after, the King was the Government in a very different and more practical sense than he is now. The real offence consisted in using force for the purpose of taking authority out of the hands in which it was lawfully deposited. The offence is the same, whether that depository was the King in person, as in the days of the Plantagenets, or the Queen represented by her ministry in Parliament, as in England at present, or the Government of India, or the various Local Governments, as in India. When the Indian Law Commissioners, in the passage already cited (*ante*, § 264), speak of the term "waging war against the Queen" as an unambiguous term, which is not to be subject to the constructive interpretations of the statute of treason, it is probable they were referring to that levying of war against the majesty of the King, which led to such cases as those of *Messenger* and *Damaree* (*ante*, § 267). They cannot have meant that no case could amount to a waging of war against the Queen, except an armed and organized rebellion for the purpose of substituting the native for the British Raj, or handing over the Empire of India to the Russians. If a riot arose between Hindus and Mahommedans in consequence of the killing of cows, and if the riot spread, and had to be put down by armed force, resistance to the soldiery would not be a waging of war under s. 121. But if an insurrection accompanied by force

[1] *Lord George Gordon's* case, *ante*, § 268.

was got up by leaders with the view of inducing the Hindu community to rise, and by violence or show of violence to coerce the Government of India into prohibiting the killing of cows, that, according to all English decisions, would certainly be a levying of war against the Queen, within the statute of Edward III.; and I imagine the Indian courts would hold it to be a waging of war within the definition of the Penal Code. It would be well, however, in all such cases to add charges under s. 121A, and under any of the sections of Chap. VIII. appropriate to the case.

§ 272. **Conspiracy.**—Section 121A was added to the Penal Code by Act XXVII. of 1870, s. 4. It gets rid of the same difficulty which was found in the Treason Act, where levying war against the King was treason, but conspiring to levy war against him was, as a mere conspiracy, only a misdemeanour. This was got over in England by treating a conspiracy to levy war as an overt act of compassing the King's death, whose life was supposed to be endangered by an invasion, or any other enterprise which might place him in the hands of his enemies. "For experience hath shown that between the prisons and the graves of princes, the distance is very small."[1] In 1848, stat. 11 & 12 Vict., c. 12, s. 3, expressly enacted that offences similar to those in s. 121A should be punishable as felonies, if the Crown chose only to treat them as such.[2] The only difficulties that can arise under the latter section are as to what constitutes a conspiracy.

§ 273. A conspiracy may be defined as a combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful means. In England indictments for conspiracy in every possible sort of case are most frequent. Under the Penal Code, the present section is the only one which renders punishable a mere conspiracy to do an illegal act, which does not go beyond the conspiracy. The only other part of the Code where the word is used is in s. 107 and the other sections relating to abetment, and there it is expressly enacted that a conspiracy only amounts to abetment, "if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing." By the Explanation of s. 121A, it is declared that "to

[1] Foster, Crim. L. 195—197.

[2] The Act of 1870 was passed by Sir James Stephen when in India and was intended as the equivalent of the English Treason-Felony Act (3 Steph. Crim. L. 308).

constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof." This brings a conspiracy under that section into conformity with the English law.

In the case of *Mulcahy* v. *The Queen*, where a Fenian was convicted under the Treason-Felony Act, and appealed to the House of Lords, Willes, J., in delivering the opinion of the judges, laid down the law as to conspiracy as follows: "A conspiracy consists not merely in the intention of two or more; but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable, if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Grose, J. said in *Rex* v. *Brissac*,[1] is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.' The number and the compact give weight and cause danger, and this more especially in a conspiracy like those charged in this indictment." [2]

§ 274. Treasonable correspondence, either by inciting a friendly State to hostility, or by furnishing valuable information to an enemy, used in England to be charged either as an overt act of compassing the King's death, or as adhering to his enemies.[3] Under the Code it would clearly be punishable as a conspiracy under s. 121A. In such a case, Lord Kenyon, C.J., said: "The criminality did not rest on an invitation to the French to invade the country. If, according to Lord Mansfield, in *Rex* v. *Hensey*, the communication was likely to be of use to the French to enable them to annoy us, defend themselves, or shape their attacks, sending such a paper with a view of its going to the enemy was undoubtedly high treason." [4] And it makes no difference that the letters, etc., were interrupted, and never reached the enemy, for the crime consists in the attempt to injure, not in the injury done.[5]

[1] 4 East, 171. [2] L.R., 3 H.L. 317.
[3] *Reg.* v. *Hensey*, 1 Burr. 643; Foster, Crim. L. 196.
[4] *R.* v. *Stone*, 6 T.R. 527.
[5] *R.* v. *De La Motte*, 21 St. Tri. 687; *per* Buller, J., at p. 807.

§ 275. As to the evidence of such a conspiracy, "loose words spoken without relation to any act or design are not treason, or an overt act; but arguments, and words of persuasion to engage in such design or resolution, and directing or purposing the best way for effecting it, are overt acts of high treason; likewise consulting together for such a purpose."[1] But words may be evidence of treason, either as explaining an act which might otherwise be innocent, or when accompanied by an act in furtherance of the intention expressed by them. For instance, in an old case it was held that threatening to kill the King, provided the person afterwards comes to England for that purpose, was an overt act of treason.[2] So letters and papers, whether published or unpublished, which "were written in prosecution of certain determinate purposes, which were all treasonable, and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, will not make a man a traitor."[3] The most important rule of evidence, however, in cases of conspiracy, is that which makes the acts, writings, and words of any one member of the conspiracy, in reference to their common intention, admissible against every other member (Act I. of 1872, s. 10, *ante*, § 236). An early example of this rule is to be found in the trial of Lord Preston[4] in 1691 for high treason, before Chief Justice Holt, where the defendant with pathetic persistence continually interrupted the judge in his summing up to point out that such an act was not done in his presence; while the judge, with unfailing patience and perfect courtesy, stopped to explain to him that when he had once got into the meshes of a conspiracy he was answerable for anything done by his associates. So in *Stone's* case,[5] where he was charged with conspiring with Jackson to send treasonable information to France, a letter by Jackson, which had been intercepted in England, was held admissible against him. Similarly in the case of *R.* v. *Hunt*,[6] where Hunt and others were indicted for unlawfully meeting together for the purpose of exciting disaffection, it was held that resolutions proposed at a former meeting at which he had presided, were admissible as showing the

[1] *Per* Holt, C.J., *R.* v. *Charnock*, in 1696; 12 St. Tri. 1377, at p. 1451.
[2] *Crohagan's* case, Cro. Car. 332.
[3] Foster, Crim. L. 198.
[4] 12 St. Tri. 645.
[5] 6 T.R. 527.
[6] 5 B. & A. 566.

intention of those who assembled at the second meeting, both having avowedly the same object. The meeting in question was attended by large bodies of men who came from a distance, marching in regular military order; and it was held to be admissible evidence of the character and intention of the meeting, to show, that, within two days of the same, considerable numbers of men were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting; and that on their discovering the persons who saw them they ill-treated them, and forced one of them to swear never to be a King's man again. Also, that it was admissible evidence for the same purpose to show, that another body of men in their progress to the meeting, in passing the house of the person who had been so ill-treated, exhibited their disapprobation of his conduct by hissing. And inscriptions, and devices on banners and flags, displayed at a meeting were held to be admissible evidence for the same purpose.

§ 276. Evidence of the acts of one person can only be used against another, "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or an actionable wrong."[1] As it has been laid down in England, "before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design."[2] Of course if this rule were to be taken literally, it would be impossible ever to prove a conspiracy. The evidence would be inadmissible till the proof was complete. Practically, the difficulty is got over in this way. Counsel for the Crown states the case he expects to prove, and the general evidence by which he hopes to make it out. When evidence is offered which strictly only affects one defendant, it is received provisionally against the others, subject to the undertaking that sufficient connection will be established between them as the case goes on. When the evidence is completed, it is the duty of the judge to decide whether, upon the whole facts, supposing them to be proved, sufficient connection is shown between the parties to make the acts of one evidence against the other. It is for the judge to say, as a matter of law, whether particular evidence can be

[1] Ind. Evidence Act, s. 10. [2] Archb. 1106.

submitted to the jury. It is for the jury to say, as a matter-of-fact, whether they believe the evidence. They are told by the judge that if they disbelieve the connecting evidence, they must disregard the evidence which assumes the connection. Where the judge tries a case without a jury, of course he performs all these mental operations himself.[1]

§ 277. **Seditious Language.**—Section 124A reproduces s. 113 of the Code as originally drafted by Mr. Macaulay. By some curious omission it seems to have dropped out of the Code, as finally passed in 1860.[2] It was adopted with some verbal alteration by Sir James Stephen, and added to the Code by Act XXVII. of 1870, s. 5. Without it there would have been no law by which what is known in England as seditious language could have been punished in India. Possibly, if occasion arose, sedition might have been treated as an offence not provided for by the Penal Code, and therefore, under s. 2, punishable by some other process. Such a step, however, would have been a very extreme measure; and the remarks of the Commissioners in Note C. of the Report of 1837, p. 117, show that the result would have been very doubtful. The section is very carefully drawn, so as to represent the law as it has settled down in England since Mr. Fox's Libel Act of 1792.[3] The most complete description of that law with which I am acquainted, is contained in the charge delivered by Mr. Justice Fitzgerald to the Grand Jury in 1868, when two journalists were tried for seditious writings, in furtherance of the Fenian conspiracy.[4] He said: "Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices,

[1] Crim. P.C., 1882, ss. 298, 299.

[2] See 19 Cal., p. 42.

[3] 2 Steph. Crim. L. 359.

[4] *Reg.* v. *Sullivan* and *Pigott*, 11 Cox, p. 45. The language used by him was quoted and relied on by Cave, J., in the case of *Reg.* v. *Burns*, 16 Cox, 365. It condenses the remarks addressed to the jury at the trial by Fitzgerald, J., in *Sullivan's* case, 11 Cox, p. 53, and by Deasy, B., in *Pigott's* case, 11 Cox, p. 60. It is also in accordance with the general language used by the English judges in directing juries in similar cases. See *per* Lord Ellenborough, *R.* v. *Lambert*, 2 Camp. 400; *per* Best, J., *R.* v. *Burdett*, 4 B. & A., pp. 120, 131; *per* Littledale, J., *Reg.* v. *Collins*, 9 C. & P. 456, at p. 461; *Reg.* v. *Lovett*, 9 C. & P. 462, p. 466; see, too, *per* Tindal, C.J., *O'Connell* v. *The Queen*, 11 Cl. & F., p. 236.

whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to subvert the Government and the laws of the Empire. The objects of sedition generally are, to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and, generally, all endeavours to promote public disorder." On the other hand, no criticism of the Government or its acts, however severe; no disapprobation, however serious or strongly expressed, amounts to sedition, where it takes the form of free and fair discussion, and where its object is to reform grievances, not to excite disaffection. "Journalists are entitled to criticize the conduct and intentions of those entrusted with the administration of the Government. They are entitled to canvass and, if necessary, censure either the acts or proceedings of Parliament, and are entitled to point out any grievances under which the people labour." "When a public writer exceeds his limit, and uses his privilege to create discontent and dissatisfaction, he becomes guilty of what the law calls sedition."[1] Exactly similar language was used by Petheram, C.J., in the only case under this section which appears to have arisen as yet in India. He pointed out the difference between the meaning of the words "disapprobation" and "disaffection," and proceeded as follows: "If a person uses either spoken or written words, calculated to create in the minds of the persons addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise; and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words, or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section, that the words used are calculated to excite feelings of ill-will

[1] 11 Cox, pp. 53, 60.

against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling."[1]

§ 278. It will be observed that both in the explanation of s. 124A, and in the language quoted above, the essence of the crime consists in the intention with which the language is used. But this intention must be judged solely by the language itself. Intention for this purpose is really no more than meaning. When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed. The mode of putting this part of the case to the jury is admirably stated by Best, J., in *R.* v. *Burdett*.[2] "With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce." The meaning is to be collected from the whole document, and not merely from isolated passages.[3] External evidence may be offered either to prove or to rebut the meaning ascribed to the language by the prosecution. For instance, where the libel consisted in asserting that the King's troops had inhumanly murdered their American fellow-subjects at Lexington, and the indictment asserted that the libel was concerning His Majesty's Government and the employment of his troops, and the defendant produced an officer who had been present at Lexington; Lord Mansfield held that he was a proper witness, not to show that the troops had behaved inhumanly, but that they had been employed on behalf of the King as his troops.[4] So where a person is libelled anonymously, it is every day's experience that

[1] *Reg.* v. *Jogendra Chunder Bose*, 19 Cal. 35, at p. 44.

[2] 4 B. & A., at p. 120. See to the same effect, *Haire* v. *Wilson*, 9 B. & C. 643; *per* Petheram, C.J., 19 Cal., pp. 45, 46.

[3] *R.* v. *Stockdale*, 22 St. Tri., at p. 292; *per* Petheram, C.J., 19 Cal., p. 46.

[4] *R.* v. *Horne*, Cowper, 762.

witnesses are called to say to whom they understood the libel to refer. But however different may be the constructions suggested, the final question to be decided is, not what was the meaning of the writer, but what was the meaning of the language he used.[1] As Chief Justice De Grey said in *Horne's* case,[2] "As the crime of a libel consists in conveying and impressing injurious reflections upon the minds of the subjects, if the writing is so understood by all who read it, the injury is done by the publication of these injurious reflections, before the matter comes to the jury and the court. The true rule to go by is laid down by Lord King in the case of *R.* v. *Matthews*,[3] that the court and jury must understand the record as the rest of mankind do."

§ 279. The truth of language charged under s. 124A as being seditious, can neither be pleaded nor proved. It is quite immaterial. This might be expected as a matter of common sense. The statements are generally true enough as matters of fact. When, for instance, the *Bangobasi* complained [4] that "we suffer from the ravages of famine, from inundations, from the oppressive delays of law courts, from accidents on steamers and railways;" no one could deny the facts; and as to the law courts and the railway accidents, it was equally true that those misfortunes had become more prevalent with the extension of English rule in India. The offence consists in making use of statements whether true or false; whether the facts are or are not grievances, as a means of exciting subjects against their rulers. As Lord Mansfield said in *R.* v. *Horne*:[5] "It may vary the degree of mischief, malice or guilt, but it is totally immaterial as to the constitution of the crime upon the record, whether the words refer to something that has existed, and misrepresent such existent facts, or are an entire fiction." As a matter of authority it is equally clear. Even as regards libels upon private individuals, it was the well-established rule, "that in an indictment or criminal prosecution for libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made has a bad reputation."[6] As regards seditious libels, the rule was equally clear, and in *Burdett's* case it was laid down as beyond doubt; and although the objection was made that

[1] *Foster* v. *Clement*, 10 B. & C. 472.
[2] Cowper, p. 637.
[3] 15 St. Tri., at p. 1391.
[4] 19 Cal., pp. 36, 37.
[5] Cowper, at p. 679.
[6] 5 Bac. Abr. 203.

the facts asserted by the defendant were true, it was not even attempted to be supported by argument at the trial.[1] By Lord Campbell's Act (6 & 7 Vict., c. 96, s .6), the law was altered to this extent, that on the trial of any indictment or information for a defamatory libel, the defendant was entitled to plead that the facts alleged were true, and that it was for the public benefit that they should be published. This act, however, does not apply to seditious libels, as to which the law remains unaltered. In the case of *Charles Gavan Duffy*, who was indicted in Ireland for seditious libel in 1847, a plea framed under Lord Campbell's Act was held to be bad in law. Blackburn, C.J., said: "It requires very little consideration to see that a provision of this sort would not apply to libels, seditious or blasphemous."[2] In a more recent case, where the same point was raised, the above decision was affirmed. Lawson, J., said: "The Court is gravely asked to give a *mandamus* requiring the magistrate to receive evidence, for the purpose of proving that it was for the public benefit that a libel should be published, with the intention of bringing the Government of the country and the administration of the law into hatred and contempt, and of exciting hostility."[3]

§ 280. In the case of the *Bangobasi* newspaper, it was contended for the defence that only the actual speaker or writer of the seditious language was liable. This plea was of course set aside at once.[4] A much more substantial question, however, arises, whether evidence of mere publication of such language, in the literal sense, without further complicity, is sufficient to warrant a conviction under the section. Under the old law in England it certainly was. In one of the prosecutions arising out of the celebrated letter by Junius to the King in 1769, Almon, a bookseller, was indicted for the publication of the libel. He had done nothing but sell the letter in the ordinary way of business. At the trial a juror put to Lord Mansfield this carefully prepared question, "Whether the bare proof of the sale in Mr. Almon's shop, without any proof of privity, knowledge, consent, approbation, or *malus animus*, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel." Lord Mansfield answered, that it was conclusive evidence, upon which the defendant was convicted.

[1] 4 B. & A., pp. 145, 146, 181. [2] *Reg.* v. *Duffy*, 9 Ir. L. R. 329.
[3] *Ex parte O'Brien*, 12 Ir. Crim. L. 29. [4] 19 Cal., p. 41.

Upon the subsequent discussion of the case, Lord Mansfield explained his answer as meaning: "If it is believed, and remains unanswered, it becomes conclusive." He went on to say: "It is liable to be contradicted where the fact will bear it, by contrary evidence tending to exculpate the master, and to show that he was not privy, nor assenting to it, nor encouraging it." What evidence would make out this defence he did not suggest. Probably nothing short of proving that the paper had gone into his shop without his knowledge or against his orders. In this and later cases the judges put it on the simple principle, that a person who makes a profit by the sale of an article in his shop, is responsible for the act of his servant in selling it.[1] Upon a similar indictment against the proprietor of a newspaper, he proved that he lived in the country, that the whole management of the paper was entrusted to an editor, and that he knew nothing of what it was to contain, or of what it did contain, till he read it next day. This, again, was held to be no defence.[2] In this respect also the law was altered by s. 7 of Lord Campbell's Act, which authorized the defendant "to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part." In a case upon this section, it was pointed out by the judges that the mode in which the above cases had been decided "was in direct contravention of the fundamental principle, that to constitute guilt there must be a *mens rea*, an intention to violate the law." "A person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful, and not in an unlawful, manner. This is the principle which is applied to other cases of acts done by servants, when it is sought to fix criminal liability on the employer. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles." "Where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorized the publication of the libel complained of. It is equally clear that though, in the authority originally given to the editor, no licence to publish libellous matter may have been contained, still such an authority may be

[1] *R.* v. *Almon*, 5 Burr. 2686. [2] *R.* v. *Walter*, 3 Esp. 21.

inferred from the conduct of the parties; as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred"[1] Of course Lord Campbell's Act is not law in India, but the rules laid down in the last case appear to be in accordance with s. 124A. The offence constituted by it requires an act coupled with a distinct intention. The man who intentionally gives circulation to seditious language is even more criminal than the men who used it to a limited audience. But it must be proved, by direct evidence, or necessary inference, that it was circulated with his knowledge or by his authority. As Petheram, C.J., said:[2] "The offence is attempting to excite disaffection by words intended to be read, and I think that, whoever the composer or the writer might be, the person who used them for that purpose, within the opinion of the jury, was guilty of an offence under s. 124A."

§ 281. The mere writing of seditious words which are not intended for publication, and are kept by the author in his own possession, would not be punishable under the above section.[3] But if a person writes seditious words, intending them to be published, and they are afterwards published, though in a different way, and to a greater extent than he had contemplated, this completes his offence. It is also to be remembered that the act of publication is complete as soon as the contents of the writing have been communicated to any person, or even if the writing itself has been parted with by the author with a view to a subsequent publication, though the person who receives it is unable to read it, and even though the document is intercepted, so that it never reaches the public for whom it is intended. As a matter of jurisdiction the offence is complete in the district where the author hands over the document, for the purpose of being communicated to the public.[4]

§ 282. **Offences against the public tranquillity**, as defined by the Code, come under the general heads of unlawful assembly, rioting, turbulent assembly, and affray, numerous

[1] *Reg.* v. *Holbrook*, 4 Q.B.D. 42, at pp. 50, 58, 61.
[2] 19 Cal., p. 41.
[3] Foster, Crim. L. 198.
[4] *R.* v. *Burdett*, 4 B. & A. 95, at pp. 126, 135—137, 143—144, 153, 158—160.

variations arising according to the mode, or the circumstances of aggravation, which accompany the special offence.

Unlawful Assembly.—By s. 141, an assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly, is—

First.—To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant; or,

Second.—To resist the execution of any law, or of any legal process; or,

Third.—To commit any mischief or criminal trespass, or other offence (see § 40, *ante*); or,

Fourth.—By means of criminal force, or show of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

§ 283. An assembly becomes unlawful by virtue of the unlawful purpose for which it is constituted, or by which it is actuated, although no actual offence is committed by any one in pursuance of such purpose. If it was originally brought together for an unlawful object, it is illegal from the very first. If it was originally an innocent assembly, as where a number of persons unite for lawful discussion, or to form a religious or caste procession, it will become illegal as soon as, from any cause, the purpose of the assembly changes into an unlawful purpose. One who is innocently mixed up with, or is a spectator of such an unlawful assembly, is not said to be a member of it, unless he has intentionally joined it or continued in it after he became aware of the facts which render it unlawful (s. 142). On the other hand, no one who intentionally joins or continues in an assembly which is or has become illegal, is allowed to say that he

was merely a harmless spectator. The danger of such an assembly arises from the mutual encouragement given by its numbers to those who form it, and the intimidation to those who are affected by the assembly. A person who, having innocently got into a crowd, is unable by the mere weight and pressure of numbers to escape from it, could not be said to continue intentionally in it. Such a case, however, would have to be made out by the person who alleged it. It should hardly have required a decision of the High Court to show that a person does not join an unlawful assembly, which he has gone out to oppose, merely by getting physically mixed up in it.[1]

§ 284. The essence of the offence defined by s. 141 is the common object of the persons forming the assembly; therefore in a charge under that section, or for rioting, it is necessary to state distinctly in the charge what is alleged to have been the common object, and this object must be proved and found by the jury or Court. In a case in which the judge in his charge had referred to two possible common objects, one of which only had been alleged, and there was nothing in the verdict to show which of these views had been accepted by the jury, it was held that there must be a new trial, as the prisoner might have been convicted of assembling with some object of which he had not been accused, and which he had not an opportunity of meeting.[2]

The objects of an assembly, alleged to be unlawful, would be established by its acts, by the placards and advertisements convening it, and by the language and conduct of its individual members, and still more of its leaders and instigators.[3]

§ 285. *Clause First.*—The mere assemblage of large masses of persons for the purpose of hearing political addresses, or even of demonstrating by their numbers the weight of public opinion which is arrayed on either side of any question of the day, is not illegal, as an attempt to overawe the Government or its officers. To bring it within this clause it would be necessary to show, that the object of the meeting was not a *bonâ fide* desire to exhibit and to influence public opinion, but a menace of the physical force which the promoters of the meeting could bring to bear in support of

[1] *Birjoo Singh* v. *Khoob Lall*, 19 W.R. Cr. 66.
[2] *Subir* v. *Reg.*, 22 Cal. 276.
[3] Evidence Act, I. of 1872, s. 10; *ante*, §§ 236, 274.

their views. It was on this ground that the Government put a stop to the series of monster meetings which O'Connell had organized in Ireland, in 1843, in support of Repeal of the Union. On his trial next year, Chief Justice Pennefather in charging the jury pointed out, that it was not necessary to show that any breach of the peace had taken place, or was intended to take place at such meetings. It was sufficient if "the persons who had collected that mass and multitude together, did so for the purpose of making a demonstration of immense physical force and power, guided and actuated by the will and command of the person who had caused that meeting to assemble;" and if "his object was to overawe the Legislature, who are likely to have to consider certain political subjects in which he was interested, and for the purpose of deterring the Legislature and the Government of the country from a free, cool, and deliberate judgment on the subject."[1] And so it would be if crowds were to assemble to hoot a Government official, who had made himself obnoxious in the discharge of his public duties, or who was supposed to favour some measure which was opposed to the popular wish.

§ 286. *Clause Second.*—The circumstances under which the execution of legal process may lawfully be resisted, have already been considered (*ante*, §§ 206—214). But it by no means follows that persons other than the party aggrieved may join him in such resistance, and still less that they may get up an opposition on their own account. The view of the English authorities appears to be, that when the illegal act of a public official creates a breach of the peace, the bystanders may interpose to prevent the peace being broken, and that if they use excessive violence, the provocation will be an extenuation of their offence (*ante*, § 226). I know of no case in which it has been held lawful to collect a number of persons to resist the execution of legal process. Hawkins says that "an assembly of a man's friends in his own house, for the defence of the possession thereof, against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law, for a man's house is looked on as his castle." Here he is evidently referring to threats of pure violence, and in the same section he states that no assembly of a man's friends

[1] Ann. Reg. of 1844, 333; 5 St. Tri. N.S., p. 608.

in public, to defend his person against those who threaten to beat him is lawful; for such a proceeding would raise tumults and disorders, and the proper remedy is by resort to the public authorities.[1] The case of *Reg.* v. *Allen* (*ante*, § 226) seems also to negative the legality of any premeditated resistance to legal process, though in itself irregular.

§ 287. *Clause Third.*—The object under this clause must be to commit mischief, criminal trespass, or some other offence. Where a criminal intention is a necessary ingredient in the offence, as it is in those specifically mentioned, the clause will not be satisfied, if it can be shown that the defendant had a right, or honestly believed that he had a right, to do the act complained of. In this respect it differs from cl. 4. A and B were joint owners of a piece of land. A erected an edifice on it without the consent of B, who obtained a decree of the Civil Court directing its removal, and removed it accordingly. Subsequently the servants of B found the servants of A putting up the erection again; they protested against its erection, pulled down the part already put up, and thrust aside the servants of A. They were convicted of rioting. This conviction was set aside by the High Court. It was clear that the defendants were not committing mischief, so as to bring the case under cl. 3, since they were doing on behalf of their master what he was legally authorized to do; nor criminal trespass, as they were on their master's land. Nor did the case come under cl. 4, as they were doing what they were entitled to do in defence of their possession of the common property. There was no violence or breach of the peace, and the police were standing by and looking on while the acts complained of took place.[2]

§ 288. *Clause Fourth.*—Under this clause it is immaterial whether the possession or enjoyment sought to be recovered was claimed under colour of title, or without it, and whether the right which is asserted is a valid or invalid one. The object of the clause is to prevent breaches of the peace, by compelling every one who desires to enforce a disputed right, to do so under the authority of the law.[3] The principle is the same as that under which the magistrate is

[1] 1 Hawk. P.C. 516.
[2] *Reg.* v. *Rajcoomar Singh*, 3 Cal. 573, pp. 584—587.
[3] *Moher Sheikh* v. *Reg.*, 21 Cal. 392.

authorized in cases where a breach of the peace is apprehended, to maintain the party in possession until suit brought, or to restore to possession one who has been dispossessed by criminal force.[1] It is in accordance with the old stat. 5 Rich. II., c. 7: "And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner." This corresponds with the Code, which only creates an offence where the persons who are attempting to enforce a real or supposed right, do so by criminal force, or show of criminal force; that is (s. 350) intending to cause injury, fear, or annoyance to those who might wish to resist them. And so Hawkins says, "It is to be observed that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly indicates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall use any resistance."[2] And, "if an entry be made peaceably, and if before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of Richard II."[3] Where there is a dispute as to the right to possession, neither party being in undisturbed possession, whichever party forcibly attempts to secure the right which he claims is punishable under this section.[4]

§ 289. This provision is one of those rare instances in which an act, which, in the view of the civil law, is legal, and gives no right of action to the person affected by it, is punishable criminally on account of its injurious consequences to the public peace. Where a tenant holds over

[1] Crim. P.C., ss. 145, 522; *Appavu Naik* v. *Reg.*, 6 Mad. 245; *re Burmah Mahto*, 23 Suth. Cr. 25.

[2] 1 Hawk. P.C. 501; *Milner* v. *Maclean*, 2 C. & P. 17.

[3] *Per* Fry, J., *Edwick* v. *Hawkes*, 18 Ch. D. 199.

[4] *Re Peary Mohun Sircar*, Cal. 639.

after his tenancy has come to an end, the landlord may enter upon the land or house, and dispossess him. If he does so in a tumultuous and forcible manner, the landlord is liable to be indicted; but the tenant cannot bring any action against him for trespass.[1] And so "if the like number (in India five or more persons) in a violent and tumultuous manner join together in removing a nuisance, which may lawfully be done in a peaceful manner, they are as properly rioters as if the act intended to be done by them were never so unlawful; for the law will not suffer persons to seek redress of their private grievances by such dangerous disturbance of the public peace."[2] And violent resistance to processions, whether legal or otherwise, on the plea that the procession was a nuisance, is illegal under s. 141, cl. 4.[3] Such an indictment cannot, however, be supported by evidence of a mere trespass, or of an entry which had no other force than such as is implied by the law in every trespass. There must be proof of such force, or, at least, of such show of force, as is calculated to prevent any resistance.[4] Further, if the legal owner of property, entitled to immediate possession, can obtain complete and peaceful possession, where there is no one present to resist, and no breach of the peace can possibly take place, he may do so, and any attempt forcibly to turn him out of possession will be illegal. A house was mortgaged to Lows in fee. He left the mortgagor in possession, and the latter let the premises to Telford. Lows went to the house early in the morning with a carpenter and another man, there being no one inside, took the lock off the door and entered into actual possession. Subsequently Telford and another got in at a side window and ejected Lows. It was held by the House of Lords that Lows had done nothing which was illegal, that he had acquired a legal possession of the house, and that the forcible entry by Telford was an indictable

[1] *Taunton* v. *Costar*, 7 T.R. 431. Whether the tenant can sue for personal violence used in the necessary process of turning him out is a question which appears still to be undecided. See *Newton* v. *Harland*, 1 M. & G. 644; and *per* Parke, B., *Harvey* v. *Bridges*, 14 M. & W., p. 442.

[2] 1 Hawk. P.C. 516.

[3] 5 Mad. H.C. Rulings vi.; 7 Mad. H.C. Rulings xxxv.; *Reg.* v. *Tirakadu*, 14 Mad. 126.

[4] 1 Hawk. P.C. 500; *per* Lord Tenterden, C.J., *R.* v. *Smyth*, 5 C. & P. 201, at p. 204.

offence.[1] Where, however, the property is land, of which it is impossible to obtain complete and exclusive physical possession by mere occupation of part, it would be unsafe, and probably illegal, to attempt such a proceeding.[2]

§ 290. It has been frequently held that the mere assemblage of numbers, with a view to repel illegal aggression upon property which is in the peaceful possession of another, is not an unlawful assembly, and that actual resistance, within the limits allowed by law, is not rioting.[3] A good deal of discredit, however, was thrown upon this view by a recent case before the Calcutta High Court.[4] In that case the following facts appeared. A watercourse issued from a river, and after passing on for about two miles, irrigated the lands of Fazilpore. The point of junction of the river and the watercourse, and the lands between this point and Fazilpore, belonged to a person who was known as the Mohashoy. Fazilpore belonged to the Thakurs. The Thakurs asserted that they had a right to erect a bund at the point of junction, so as to secure the irrigation of Fazilpore. This right was denied by the Mohashoy; but it was found, as a fact, by the courts below that it had been the practice to erect such an embankment. On the occasion in dispute the Thakurs went to the spot, either to renew a bund which had been entirely washed away, or to renew a bund which had been partially washed away. They went peacefully, at 10 a.m., in such numbers as were necessary for the purpose, and without arms or any show of force. While they were working, about twelve hundred of the Mohashoy's people, many of them armed with latties, and headed by the petitioners, assembled together, and proceeded to the bund. Then twenty-five or thirty men detached themselves, and attacked the Thakurs party, the most of whom had already fled, wounded five, and left

[1] *Lows* v. *Telford*, 1 App. Ca. 414; see *per* Lord Selborne, at p. 426. It must be remembered that under the English statute a forcible entry may be committed by a single person as well as by twenty. 1 Hawk. P.C. 502.

[2] See *per curiam*, 6 Mad., p. 246.

[3] *Reg.* v. *Mitto Singh*, 3 Suth. Cr. 41; *Reg.* v. *Sachee*, 7 Suth. Cr. 112; *Reg.* v. *Tulsi*, 2 B.L.R. A. Cr. 16; S.C. 10 Suth. Cr. 64; *Reg.* v. *Guru Charan*, 6 B.L.R., Appx. 9; S.C. 14 Suth. Cr. 69; *Birjoo Singh* v. *Khub Lall*, 19 Suth. Cr. 66; *re Shunker Singh*, 23 Suth. Cr. 25; *Reg.* v. *Rajcoomar Singh*, 3 Cal. 584. See, too, 4 Mad. H.C. Rulings lxv., which, however, may be doubted.

[4] *Ganouri Lal Das* v. *Reg.*, 16 Cal. 206, pp. 213—221.

three senseless on the ground. The petitioners were acquitted on the charges of wounding, which, with regard to the provisions of s. 149, was a matter for some congratulation. They were convicted of rioting under s. 147, which raised the question whether, before the use of actual violence, they were members of an unlawful assembly. The High Court affirmed the sentence, and there can be no doubt was perfectly right. Even if the Thakurs were trespassers, which they probably were not, the case was specially one which the authorities should have been called on to settle, and the amount of violence, prepared for and used, was, under any circumstances, indefensible. The Court, however, proceeded substantially to lay down the general rule, that no force could be used against trespassers, unless their trespass amounted to a crime. They seemed to think that this was undoubtedly the law of England. I have already pointed out (*ante*, § 220) that the law of England does not permit the owner of property to attack a trespasser; but it does permit him gently to press the trespasser away, and, if resisted, to continue the pressure while protecting his own person against any violence that may be offered. This principle appears to have been followed in India in the cases cited above. Some of them were distinguished by the High Court, on the ground that the acts resisted were crimes, and came within s. 104. In some of them this does not appear to have been so, and one such case[1] the Court proceeded to overrule. It seems strange to assert that if half a dozen men came and sat down in your house, or took possession of your garden, they could not be interfered with, except by applying to a magistrate, who might be twenty miles off. In support of this view, the Court said (p. 219): "The section refers to 'right or supposed right.' This would seem to make a division into (1st) rights in actual enjoyment when interfered with; (2nd) rights claimed, though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, etc., defends the right by restoring the *status quo ante*, and with it the actual enjoyment." It seems to me, with great deference, that the words are meant to show that, in cases to which the section applies, tumultuous force is illegal, whether the person has or has not the right which he claims. Does the section apply only to cases in which a claimant,

[1] *Reg.* v. *Mitto Singh*, 3 Suth. Cr. 41.

being out of possession, seeks to oust the person in possession by force, or does it also extend to cases in which a person in peaceful possession uses the necessary force to prevent being dispossessed? Take one of the illustrations given by the Court. If my neighbour refuses to allow me to draw water at his well, I cannot use numbers and force to assert my right, though it is a perfectly good one. But if I find half a dozen men standing round my own well, am I to do without water till I can get a magistrate to help me? It is clear that a previous peaceful possession is not displaced by a mere act of illegal violence. "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession; and if the question is, which of the two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."[1] On the other hand, where a right is exercised over the land of another, such as a right of way, a right of common, a right of water, no one is in possession of it, except during the actual moment when he is peacefully exercising his right.[2] Any attempt to vindicate such a right by force must necessarily be an attempt to enforce a right, or supposed right, within the meaning of s. 141, cl. 4, and not an act done to maintain an existing and peaceful possession, within the meaning of the cases previously cited.

§ 291. *Clause Fifth.*—An assembly will also be unlawful, where its object is, by criminal force or show of force, to compel a person to do what he was not legally bound to do, or to omit to do what he was legally entitled to do. This clause differs from cl. 4 in the omission of any reference to a supposed right. A gathering of ryots to prevent a distress for land revenue or rent, or to prevent a purchaser at an auction sale from taking possession of the property sold to him, would come within the section, if the proceedings taken were legal.[3] Assemblages to resist religious or caste processions would be illegal under this clause, if the procession was itself one which the persons forming it had a right to carry out. Even if its legality was doubtful, resistance might still be unlawful under cl. 4. (See cases cited, *ante*, § 289). So all violence used to compel work-

[1] *Per* Maule, J., in *Jones* v. *Chapman*, 2 Exch., p. 821, cited and approved by Lord Selborne, 1 App. Ca., p. 426.
[2] 1 Hawk. P.C. 502.
[3] See 4 Mad. H.C. Rulings lxv.; *Reg.* v. *Ramayya*, 13 Mad. 148.

men to join in a strike, or to refrain from continuing in their employment. Where a number of people united in making disturbances at Covent Garden Theatre, and prevented the performances going on, in order to show their disapprobation of a change in the prices of admission, Sir J. Mansfield, C.J., said: "If people endeavour to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled down."[1]

§ 292 **Rioting.**—As already observed, the mere fact of joining an unlawful assembly is itself an offence, and is punishable under s. 143. If any force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting by s. 146, and is punishable under s. 147; or if the offender was armed with a deadly weapon, under s. 148.[2] Further, by s. 149, if any specific offence was committed by any member of the unlawful assembly, every person who, at the time of committing it, was a member of the same assembly, is guilty of that offence, provided it was committed, or was an offence which the members knew was likely to be committed, in prosecution of the common object of that assembly. This subject has already been discussed with reference to s. 34, and the kindred sections in §§ 229—232, to which the reader is referred. Whether the unlawful act was committed in prosecution of the common object, so as to bring the case within ss. 146 or 149, is a question of fact on all the circumstances of the case.[3] Where the object of the assembly was to drive off some herdsmen, and after this object had been accomplished, the defendant got into a merely personal altercation with one of the opposite party, and wounded him with a spear, it was held that the other members of the party were not liable in respect of this act under s. 149.[4] Similarly, it was held that a man who had

[1] *Clifford* v. *Brandon*, 2 Campb. 358.

[2] As to the term "deadly weapon," see *Reg.* v. *Nathu*, 15 All. 19. The person so armed only can be convicted under s. 148 (*Sabir* v. *Reg.*, 22 Cal. 276).

[3] *Reg.* v. *Golam*, 4 B. & R., Appx. 47; S.C. 13 Suth. Cr. 33; *Moher Sheikh* v. *Reg.*, 21 Cal. 392; *Jahiruddin* v. *Reg.*, 22 Cal. 306; *Reg.* v. *Bisheshar*, 9 All. 645.

[4] *Reg.* v. *Binod*, 24 Suth. Cr. 66.

retired wounded from a fight, had ceased to be a member of the assembly, so as to be liable for what happened afterwards.[1] And even where the party was engaged in the common object of ejecting the opposite party from land, the title to which was disputed, and one of the aggressors, who was armed with a gun, fired it in the heat of the struggle, and killed his opponent, a Full Bench of the High Court of Calcutta exonerated the other members of the same party from the charge of murder, holding that the act was sudden and unpremeditated on the part of the man who fired, and that no homicidal intention had been entertained by any of the others in entering upon the contest.[2] Persons who, under similar circumstances, wish to avoid a similar risk, would do well not to allow men armed with deadly weapons to join their enterprise.

It must be remembered that where a person is guilty of rioting, and at the same time commits a distinct offence independent of the rioting, he may be charged and punished separately for each offence.[3]

§ 293. **Turbulent Assembly.**—An assembly of five or more persons likely to cause a disturbance of the public peace is of itself illegal under English law, but is only punishable criminally under the Code after such assembly has been lawfully commanded to disperse (s. 151). Such a disobedience to summons where the assembly is unlawful is punishable additionally by s. 145.

"A magistrate, or officer in charge of a police-station, may command any unlawful assembly, or any assembly of five or more persons, likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such unlawful assembly to disperse accordingly."[4] On failure to do so, the magistrate, or where no magistrate can be communicated with, any commissioned officer of Her Majesty's Army, may disperse it by military force.[5]

§ 294. The Penal Code contains no definition of an assembly likely to cause a disturbance of the public peace.

[1] *Reg.* v. *Kabil*, 3 B.L.R. A. Cr. 1.
[2] *Reg.* v. *Sabed Ali*, 11 B.L.R. 347; S.C. 20 Suth. Cr. 5.
[3] *Reg.* v. *Callachand*, 7 Suth. Cr. 60; *Reg.* v. *Bisheshar*, 9 All. 645; and see Part I., note to s. 71.
[4] Crim. P.C., s. 127.
[5] Crim. P.C., ss. 128—131. The entire law as to dealing with unlawful and riotous assemblies has been discussed, *ante*, §§ 92—96.

In *Reg.* v. *Vincent*,[1] Alderson, B., stated the law as follows: "Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness."

An assembly is not unlawful as likely to cause a disturbance of the public peace, unless the disturbance is likely to follow from its own acts. This was so held in the case of the *Salvation Army*. They assembled with others for a strictly lawful purpose, viz. the promotion of religious feelings according to their own special procedure, and with no intention of carrying it out in an unlawful manner, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that this did not constitute their meeting an unlawful assembly.[2] The same rule would govern cases of processions, and meetings, public or private, which, though in themselves lawful, might be at the time obnoxious to popular feeling.

§ 295. **Affray.**—The essence of an affray (s. 159) consists in the publicity of the place, and the disturbance of the public peace. "It is said that the word 'affray' is derived from the French word *effraier*, to terrify, and that, in a legal sense, it is taken for a public offence to the terror of the people. From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people."[3] There is a distinction between doing an act in public, that is in a place where it can be seen by the public,

[1] 9 C. & P. 91.

[2] *Beatty* v. *Gillbanks*, 9 Q.B.D. 308.

[3] 1 Hawk. P.C. 487.

and doing it in a public place, that is, in a place to which the public have lawful access by right, permission, usage, or otherwise. In the latter case, an affray is an infringement on the lawful right of access enjoyed by the public. It is not so in the former case. Hence it was held that no offence was committed under s. 159 by a fighting which took place on a *chabutra*, which was private property adjoining a public road, although the public could see what was taking place.[1]

As to taking security for keeping the peace, see *post*, § 773.

[1] *Reg.* v. *Sri Lal*, 17 All. 166; see also Part I., note to s. 294.

CHAPTER VI.

DISOBEDIENCE TO ORDER OF PUBLIC SERVANT.

§ 296. CHAPTER X. of the Penal Code contains various sections which are grouped under the general head of Contempts of the Lawful Authority of Public Servants. Few of these require any detailed examination, beyond the short notes which are appended to the sections in Part I. Sections 181 and 182 are examined in Chapter VII. In this chapter some remarks will be offered upon the section relating to Disobedience to an order of a Public Servant.

"Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces or is likely to produce harm" (s. 188).

In order to constitute the offence created by this section, it is necessary to show: *First*, a lawful order promulgated by a public servant; *second*, knowledge of the order, and

disobedience to it; and, *thirdly*, a special class of results likely to follow from such disobedience.

§ 297. Some of the most important cases of orders by public servants are those provided for by Chapters X., XI., and XII. of the Crim. P.C. Chapter X., s. 133,[1] authorizes the magistrate to issue a conditional order for the removal of nuisances, which becomes absolute in the ways specified in ss. 136, 137, 139, and breach of which, when it has become absolute, is declared to be punishable under s. 188 of the Penal Code.[2]

Under Chapter XI., s. 144, "in cases where, in the opinion of a district magistrate, a sub-divisional magistrate, or of any other magistrate specially empowered by the Local Government or the district magistrate to act under this section, immediate prevention or speedy remedy is desirable, such magistrate may, by a written order stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession, or under his management, if such magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray. An order under this section may, in cases of emergency, or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*. An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place. Any magistrate may rescind or alter any order made under this section by himself or any magistrate subordinate to him or by his predecessor in office. No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs."

§ 298. Under Chapter XII., s. 145, where a magistrate "is satisfied from a police report or other information, that a dispute likely to cause a breach of the peace exists, concerning any tangible, immovable property, or the boundaries

[1] See it cited in full, *post*, § 373. [2] Crim. P.C., s. 140.

thereof within the local limits of his jurisdiction," he is to make certain inquiries as to the fact of actual possession of the subject of dispute.[1] "If the magistrate decides that one of the parties is then in such possession of the said subject, he shall issue an order declaring such party to be entitled to retain possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction. Nothing in this section shall preclude any party so required to attend from showing that no such dispute as aforesaid exists or has existed; and in such case the magistrate shall cancel his said order, and all further proceedings thereon shall be stayed."

A similar power is given under s. 147, where the dispute arises as to the right to exercise some privilege in the nature of an easement. By the various Police Acts, the superior officers of police are given full authority to direct processions, and to regulate the use of music in streets.[2]

§ 299. Where a public officer has passed an order which he is competent to make in a matter over which he has jurisdiction, it is no defence to a charge for disobedience under s. 188 that the order was one which, from some error in law or in fact, he ought not to have made. So long as the order exists it cannot be questioned by any one, who would otherwise be bound by it, on the ground that it ought not to have been passed.[3] Nor can it be set aside by a Civil Court, whose function is to determine rights, whereas the powers in question are given to the magistrate to prevent injurious consequences to the public arising from the exercise of rights. As regards Chapter X. this was decided by a Full Bench in Calcutta, under the corresponding chapter of the Act of 1861,[4] and s. 133 of the present Act expressly provides that "no order duly made by a magistrate under this section shall be called in question in any Civil Court." As to orders under Chapter XI., s. 144, it was decided on the corresponding sections of the Codes of 1861 and 1872, that the procedure, being a summary process

[1] As to the term indicated by the words "actual possession," see *Katras-Jherriah Coal Co.* v. *Sibkrista Daw*, 22 Cal. 297.

[2] Act V. of 1861 (General), and ss. 30, 30A, as amended by Act VIII. of 1895, ss. 10, 11; Act XXIV. of 1859, s. 49 (Madras); Bengal Act IV. of 1866, s. 62; Bombay Act VII. of 1867, s. 27.

[3] *Reg.* v. *Narayana*, 12 Mad. 475.

[4] *Ujalamayi* v. *Chandra Kumar*, 4 B.L.R. F.B. 24.

intended to meet cases of emergency, was not a judicial proceeding, and was not subject to revision by the High Court,[1] and could not be interfered with under s. 15 of the Charter Act.[2] Orders made under Chapter XII. are on their face provisional, and only remain in force till the question of right is decided by a Civil Court;[3] till such a decision has been given, the High Court has no power to review the finding of the magistrate as to possession,[4] and disobedience to the order is punishable under s. 188 of the Penal Code.[5] As soon as, from any cause, an order has lapsed, or where it is from its nature temporary, it is no offence to act as if it had never existed.[6]

§ 300. It is not a punishable offence to disobey an order which it is not competent for the magistrate or other public authority to make. As, for instance, an order made under s. 62 of the Act of 1861, corresponding to s. 144 of the present Act, directing the removal of an embankment, on the ground that the adjacent lands were in danger of being flooded.[7] A similar order, by way of a municipal bye-law, announcing that owners of cattle would be punished if the cattle did mischief by straying.[8] An order by a Mamlutdar, directing the accused to keep his gateway open, so as to give effect to a right of way through it claimed by another person.[9] So orders issued by the district magistrate of Broach, and by the municipality of Ahmedabad, forbidding the giving of caste dinners, at a time when an outbreak of cholera was apprehended, however sensible as matters of advice, were held to be absolutely invalid, and convictions under s. 188 for disobedience to them were set aside.[10] It has also been held that a magistrate cannot, under a section corresponding to s. 144, make an order which is in its nature irrevocable, such as directing the owner of land to cut down a large quantity of trees.[11]

[1] *Reg.* v. *Abbas Ali*, 6 B.L.R. 74; *per* Turner, C.J., *Sundram* v. *Reg.*, 6 Mad., p. 222.
[2] *Re Chunder Nath Sen*, 2 Cal. 293.
[3] Crim. P.C., ss. 145, 147.
[4] *Bharut Chunder* v. *Dwarkanath Chowdhoy*, 15 Suth. Cr. 86.
[5] *Goluck Chandra* v. *Kali Charan*, 13 Cal. 175.
[6] *Reg.* v. *Sheodin*, 10 All. 115.
[7] 5 Mad. H.C. Rulings xix.
[8] *Reg.* v. *Amiruddin*, 6 B.L.R. 78, n.; S.C. 12 Suth. Cr. 36; *Reg.* v. *Mazafar Khalifa*, 9 B.L.R., Appx. 36; S.C. 18 Suth. Cr. 21.
[9] *Reg.* v. *Khundoji*, 5 Bom. H.C. C.C. 21.
[10] *Reg.* v. *Sakhonidas*, 14 Bom. 165; *Reg.* v. *Harilal*, *ibid.* 180.
[11] *Uttam Chunder* v. *Ram Chunder*, 13 Suth. Cr. 72.

§ 301. The validity of a magistrate's order under Chapters X., XI., XII., depends not on the illegality of the act forbidden, but on the injurious consequences to the public health, safety, or peace, which may arise from its being forbidden. In some cases the existence of such consequences is itself sufficient to make the act illegal. As for instance, where a trade, which is a perfectly lawful occupation, and carried on in a lawful manner, is a public nuisance from the noxious fumes or smells which it produces (see, *post*, § 371). In some cases the act is absolutely lawful, but in certain conditions of popular feeling is likely to lead to a breach of the peace, which justifies a suspension of its exercise for the sake of the public. For instance, where a landholder has established a new *hát*, or market, near an old-established *hát* belonging to a neighbourhood, and public disturbances were apprehended, it was held that the magistrate was justified in forbidding the holding of the new *hát* on the same days as were usual for the old one.[1] In a similar case, where the magistrate had issued an order absolutely forbidding the holding of a *hát* on Tuesdays and Fridays, the High Court of Calcutta ruled that the order was illegal. The magistrate "might have prohibited the holding of the *hát* on any particular occasion or occasions; but he had no right to deprive the plaintiff for ever of a right, to which by law he was entitled."[2] This difficulty is got over by the clause in s. 144 of the Act of 1882, which provides that, as a general rule, no order under that section shall remain in force for more than two months. On the other hand, where the magistrate directed the hereditary priests and managers of a temple to widen and heighten the doorway, so as to supply better ventilation, and safer means of ingress and egress for the crowds of pilgrims who resorted to it in certain times of the year, the order was held valid, and disobedience to it punishable under s. 188.[3] If such an order were made under s. 144, it would probably be held that the clause limiting the duration of the order had no application to cases where the order directed a single act, and was exhausted when that act was executed. Where, however, a magistrate was asked to issue an injunction under s. 62 of the Act of 1861, forbidding a man from

[1] *Re Bykuntram*, 10 B.L.R. 434; S.C. 18 Suth. Cr. 47, under s. 62 of the Act of 1861.

[2] *Gopi Mohun* v. *Taramoni*, 5 Cal. 7, under s. 518 of the Act of 1872.

[3] *Reg.* v. *Ramachendra Eknath*, 6 Bom. H.C. C.C. 36.

building a house, whose drippings when finished would fall on the petitioner's premises, and the magistrate bound the opposite party over under s. 282 of the same Act (ss. 144 and 107 of the Act of 1882) on the ground that a breach of the peace would be likely to ensue if the contemplated building was carried out, the whole proceeding was held to be illegal. It is obvious that the case was not one which, on the petitioner's own showing, would have warranted an order under s. 62, the ground of complaint being some future evil which might never happen, and could be adequately redressed by a civil suit. As to s. 282, a magistrate had clearly no right to bind A over not to do a perfectly lawful act, merely because B said that he might be unable to refrain from beating A if he did it.[1]

§ 302. A very common instance in which these questions have been discussed is in regard to the right to go with processions or insignia on the public highways. *Primâ facie* every individual has a right to pass along the public highways in any manner, and with any number of attendants, he chooses, provided he does no injury to any one else. And the fact that he has never done so before is no reason why he should not do so now. Accordingly, the Madras Sudder Court ruled that a priest had a right to pass with a palanquin in procession through the high street of Salem, accompanied by his disciples, bands of music, banners, etc., and laid it down that "such right is inherent in every subject of the State, not requiring to be created by sunnud or patent, and it lies upon those who would restrain him in its exercise, to show some law, or custom having the force of law, depriving him of the privilege.[2] On the other hand, the persons who exercise this right must not interfere with the ordinary use of the streets by the public, and must submit to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare, or breaches of the public peace, or to maintain the corresponding rights of other religious sects. For instance, an order forbidding the use of music by a procession while passing a place of public worship, where worship is actually going on, would be legal, though it would be illegal to direct that music should always cease when a procession passed a place of

[1] *Re Kashi Chunder Doss*, 10 B.L.R. 441; S.C. 19 Suth. Cr. 47.

[2] Mad. Dec. 219 of 1857; *Sivappa Charry* v. *Mahalinga Chetti*, 1 Mad. H.C. 50.

worship where no ceremonies were taking place at the time.[1]

§ 303. A very important question may arise as to whether a magistrate should invariably prohibit certain acts, merely upon the ground that they may endanger public tranquillity. There may be cases in which religious or political bigotry will render it certain that a disturbance will ensue upon the exercise of certain rights, and yet it may be the duty of the magistrate to support the parties who claim that exercise in the face of all opposition. For instance, the establishment of a Christian place of worship in a Brahmin's village, and the attendance of native converts at Divine worship, might be certain to produce a breach of the peace; and yet it would, I conceive, be the duty of the magistrate to call out an armed force, if necessary, rather than to allow unoffending persons to be intimidated out of their lawful privileges. Accordingly, the right of the members of any religious sect to build places of worship upon their own property, however near to other places of worship of rival sects, and to perform their worship, provided they do not cause material annoyance to their neighbours, has been recently recognized in the most unqualified manner by the Indian courts.[2] I imagine the true rule to be, that where the exercise of a right is a mere luxury, the temporary denial of which would not practically interfere with a man's general rights as a subject, he may fairly be forbidden to enforce his rights at the risk of public disturbance. But where the right is one of a substantial nature, which enters into the daily usages of life, there the magistrate is bound to support the subject against illegal opposition. Tranquillity ought not to be maintained by a sacrifice of liberty. For instance, I conceive the magistrate ought, at all hazard, to support every sect in the practice of their religious rites in such places as are set apart for them. This is a substantial right; but if they wish to parade about the streets with the symbols of their faith, this is a mere luxury, and may fitly be refused if it is likely to be attended with a disturbance. This was the ground of the recent rulings in the case of the *Salvation Army* in Bombay.[3] In a case before the Sudder

[1] *Muthialu* v. *Bapun*, 2 Mad. 140; *Parthasaradi* v. *Chinna Krishna*, 5 Mad. 304; *Sundram Chetty* v. *Reg.*, 6 Mad. 203.

[2] *Seshayyangar* v. *Seshayyangar*, 2 Mad. 143; *Madary* v. *Goburdhon*, 7 Cal. 694; *Parthasaradi* v. *Chinna Krishna*, 5 Mad. 304.

[3] *Reg.* v. *Tucker*, 7 Bom. 42.

Court of Madras,[1] the right of a certain low caste in Tinnivelly to carry their corpses to burial along the public road, there being admittedly no other road, was successfully maintained. In a similar case from the same district, the magistrate made an order, under s. 532 of the Act of 1872, corresponding to s. 147 of the present Criminal Procedure Code, by which he prohibited the weavers from carrying corpses through a public street inhabited by Mohammedans, who had offered a violent resistance on a previous occasion. The order was set aside as illegal. The Court said that except where danger to public health was occasioned, the conveyance of corpses along a highway is not an unlawful use of a highway. When the conveyance of corpses by a particular highway is unnecessary and repugnant to the feelings of the inhabitants, a magistrate may properly exercise his influence to induce the persons concerned to abandon that route.[2] The Court did not suggest that if they insisted upon their right they should be compelled to give it up, in order to avert an illegal riot. It is evident that in all these cases half the opposition would die away when it was known that Government was not enlisted in its favour. Nothing fosters caste prejudice like magisterial countenance.

§ 304. In order to establish disobedience to an order, it is essential to prove the existence of the order, and this fact can neither be assumed nor inferred. If legal evidence of it is wanting, the charge must fail.[3] Further, the order must be such as the accused ought to have felt himself bound to obey. "The order ought to contain a clear statement of the facts, which the magistrate, in the exercise of his judicial discretion, considers to constitute the material facts of the case, and upon the footing of which he has made the order. It is only fair to the party against whom the order is passed, that he should be made to know distinctly the grounds upon which the magistrate has acted, in order that he may be better guided to a conclusion as to whether the order is one which he is bound to obey, or whether he can safely resist it either under the Penal Procedure, which is laid down by s. 188 of the Penal Code, or by showing cause under the provisions of s. 308 and the following section (of the Crim. P.C. of 1861, s. 135 of the Act of 1882). But

[1] F.M.P. 57 of 1959. [2] *Re Narayana*, 7 Mad. 49.
[3] *Re Dwarick Misser*, 18 Suth. Cr. 30.

whether an order would be bad or not, when it did not contain a statement of the material facts in the way I have indicated, I still think that at least the record which is sent up to this court, when the validity of the magistrate's order is put in question, should disclose all the facts upon which the magistrate acted, and upon which he relied for the justification of his order. . . . I think we ought not to maintain orders of this kind in force, unless we see that the facts of the case as exhibited in the record justify them in law."[1] Further, the order must show on its face that it applies to the accused, either as an individual or as a member of the class to which it is addressed. In a case where one Gobinda Chander Sahu had established a new *hát* on his land in the neighbourhood of an old one, from which public disturbance was apprehended, the magistrate issued an order which, after reciting the facts, ended as follows: "It is hereby ordered that the said Gobinda Chander Sahu and all other persons abstain from holding such *hát*, or any *hát* whatever, near or within the *hát* at Krishnagange on any Tuesday or Saturday." The accused was a trader who came to a *hát* which was held in violation of the order to sell his wares. He was convicted under s. 188. The Court held that the conviction was bad. They said of the order, "It is almost impossible to read the words as including the conduct of people who do not hold the *hát* as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling at the *hát*."[2] Lastly, it must be established that the order came to the knowledge of the accused before he did the act complained of. In case of orders made under ss. 133 or 144 of the Crim. P.C., a particular mode of service or proclamation is provided by s. 134. A conviction under s. 188 was, however, held to be valid, although the directions of the Crim. P.C., s. 134, had not been observed. Wilson, J., said: "I think we may fairly say that the terms of s. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is an irregularity when they are not;

[1] *Per* Phear, J., *re Harimohun Malo*, 1 B.L.R. A. Cr., p. 23; *re Kishoree Mohun*, 19 Suth. Cr. 10; *Gobind Chander* v. *Abdool Sayad*, 6 Cal. 835; *Kali Kristo* v. *Golam Ali*, 7 Cal. 46.

[2] *Parbutty Charan* v. *Reg.*, 16 Cal. 9.

but it does not follow that the order is a nullity in consequence, and I think that when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code."[1]

§ 305. Disobedience to a lawful order is not an offence under s. 188, unless such disobedience causes, or tends to cause, some of the specific consequences stated in that section. It applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party. The proper remedy for disobedience to an injunction of the court is committal for contempt of court.[2] Accordingly, convictions under s. 188 were set aside where the accused disobeyed an order issued by a Collector, forbidding him to cultivate land in the bed of a tank.[3] And so, where a magistrate issued an order directing persons in possession of arms to take out licences under s. 26 of Act XXXI. of 1860, a conviction under s. 188 for being found in possession of arms without a licence was quashed. What the defendants were carrying arms for was the lawful purpose of destroying game, and there was not the slightest indication to show that, in so doing, they would cause, or were in the least likely to cause, injury or annoyance to any person.[4] Where, however, the statutory consequences have followed, or might have followed, from the disobedience, it is no answer that the defendant neither intended nor contemplated them (s. 188, Explanation). The offence consists in disobedience. The element of intention is immaterial.

Where increased punishment is inflicted under the last clause of s. 188, the finding must state facts to show that the case contains elements of aggravation which would warrant the punishment.[5]

[1] *Parbutty Charan* v. *Reg.*, 16 Cal. 9; *Hochan* v. *Elliot*, 5 Suth. Cr. 4.
[2] *Re Chandrakanta De*, 6 Cal. 445.
[3] 4 Mad. H.C. Rulings vi.; S.C. Weir, 36 [57].
[4] *Reg.* v. *Nandkumar Bose*, 3 B.L.R., Appx. 149.
[5] *Reg.* v. *Ratanrav*, 3 Bom. H.C. C.C. 32.

CHAPTER VII.

OFFENCES AGAINST PUBLIC JUSTICE.

§ 306. **False Evidence.**—In order to constitute the offence of giving false evidence, it is necessary (1) that the statement should have been made under circumstances which raise it from a mere assertion or a promise, into what can be described as evidence; (2) that it should be false; and (3) that its falsity should be known to the person making it.

No promise or undertaking, however formal, or however important it may be as evidence, in the ordinary acceptation of the word, comes within the meaning of the term as used in s. 191. It must be a statement made in reference to some matter as to which the defendant is legally bound on an oath, or by some express provision of law to state the truth; or it must be a declaration which he is bound by law to make (s. 191); or it must be contained in a legal certificate (s. 197); or in a declaration which is by law receivable as evidence (s. 199).

§ 307. The first head includes all testimony given by a witness in court. As to this, the only questions that can arise

are, whether the testimony was given on oath, and whether the witness was legally bound by the oath. An oath is defined by the Code[1] as including "a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a court of justice or not." By Act X. of 1873, s. 6, it is provided that where the witness is a Hindu or Mohammedan, or has an objection to taking an oath, he shall, instead of making an oath, make an affirmation. In every other case he shall make an oath. Section 13 enacts that "No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." By s. 14, "Every person giving evidence on any subject before any person hereby authorized to administer oaths and affirmations, shall be bound to state the truth on such subject." By the Indian Evidence Act, s. 114, cl. (*e*), the Court may presume that judicial and official acts have been regularly performed. The result of these provisions is, that the legal obligation to tell the truth attaches to a witness, by the mere fact that he gives testimony as such in a court where he could legally be put on oath, whether in fact he has been sworn or not, and whether the oath has been administered in a binding form or not. Accordingly, in a case where the defendant was charged under s. 193, and no evidence was forthcoming that he had been actually affirmed before giving evidence, the Court, independently of the presumption that he had been affirmed, said: "It seems clear that the offence of giving false evidence may be committed, although the person giving evidence has been neither sworn nor affirmed."[2] This ruling has been applied to cases where the omission to administer an oath or affirmation was intentional and not merely accidental. For instance, the evidence of a child has been held admissible where the judge considered that, although it was incapable of understanding the nature of an oath or solemn affirmation, it was capable of understanding the questions put, and returning rational answers

[1] Section 51; see also Indian Oaths Act, X. of 1873, s. 15.
[2] *Gobind Chandra* v. *Reg.*, 19 Cal. 355.

to them, and therefore recorded and acted on its statement, without oath or affirmation.[1] In all such cases, of course, it is assumed that the statements made are offered as evidence by the person who makes them, and are accepted as such by the tribunal which records them. For instance, if a judge, wishing to inform his mind upon any point, were to call upon some one who was present in court, and to put questions to him, without oath or affirmation, it would be fairly open to such a person, if he were indicted under s. 193, to say that he never considered that he was a witness at all, or that his answers were to be treated as evidence in the cause. Supposing this to be made out, it seems to me that it would be a sufficient defence. In short, under s. 13 of Act X. of 1873, the administering or omission to administer an oath or affirmation may be very material as showing that certain answers were or were not treated as evidence, but would be immaterial as rendering what really was intended to be evidence inadmissible, or as diminishing the responsibility of the person who gave it.

§ 308. A witness must not only be bound, but he must be legally bound by an oath; that is, he must have made his statement before an authority legally competent to record a statement on oath. "It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their doing so, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle."[2] Accordingly, where an appeal was made under

[1] Evidence Act, s. 118; *Reg.* v. *Sewa Bhogta*, 14 B.L.R. 294; S.C. 23 Suth. Cr. 12; folld. *Reg.* v. *Shava*, 16 Bom. 359; *contra per* Mahmood, J., *Reg.* v. *Maru*, 10 All. 207, which decision was approved in *Reg.* v. *Lal Sahai*, 11 All. 183, to the extent of holding that a judge who considers a witness competent to depose has no option but to administer to him either an oath or affirmation. Even before Act X. of 1873, I have frequently seen the judges of the High Court, at the Criminal Sessions in Madras, receive the evidence of a little child, after directing it simply to be told to tell the truth. My own experience is that such evidence is generally much more to be relied on than that of more mature witnesses.

[2] 1 Hawk. P.C. 431.

s. 72 of the Registration Act III. of 1877 against the refusal of the sub-registrar to register a document, and the registrar directed the deputy magistrate to make an inquiry into the case, and the accused made a statement before him on oath which was alleged to be false, it was held that the deputy magistrate had no jurisdiction to make the inquiry, and that no conviction could be supported, either under s. 82 of the Registration Act, or under s. 193 of the I.P.C.[1]

Other instances of unauthorized inquiries, in which oaths were administered without jurisdiction, and held insufficient to support convictions for false evidence, will be found below.[2] Nor is a person punishable for giving a false oath, where the court had power to make an inquiry, but had no power to put the person upon oath.[3] As, for instance, where a pardon was illegally tendered to an offender, who was then examined upon oath.[4] Where a judge, without any authority, altered the title of a cause, so as to change it into another cause, which had never been legally instituted, and after such change the prisoner was sworn and gave false evidence, it was held that the conviction was bad. Cockburn, C.J., said: "I think that the alleged perjury was committed on the hearing of a cause which had no existence, and in which the judge had no jurisdiction."[5] An oath taken in the trial of a cause which the court had no jurisdiction to hear—as, for instance, in a Small Cause Court, for the possession of land—is not criminally punishable.[6] It must, however, be remembered that, where jurisdiction depends upon the existence of certain facts, such as value, or situation of property, that a ship is of a particular class, or that a man is of a particular nation, and where the charge, on its face, brings itself within the jurisdiction, the court is bound to commence the inquiry, and in doing so acts within its jurisdiction. If it comes to the conclusion that the facts necessary to give it jurisdiction do not exist, it will dismiss the suit or the charge, but the proceedings will not be null and void *ab initio*. If it comes to a wrong conclusion, its decision, if appealable, may be set aside, and

[1] *Radhika Mohun* v. *Lal Mohun*, 20 Cal. 719.

[2] *Reg.* v. *Jibhai Vaja*, 11 Bom. H.C. 11; *Subba Chetti* v. *Reg.*, 6 Mad. 252; *Reg.* v. *Chaitram*, 6 All. 103; *re Iswar Chunder Guho*, 14 Cal. 659; *Reg.* v. *Dala Jiva*, 10 Bom. 190.

[3] *Kotha Subba* v. *Reg.*, 6 Mad. 252; *Reg.* v. *Subbayya*, 12 Mad. 451.

[4] *Reg.* v. *Dala Jiva*, 10 Bom. 190.

[5] *Reg.* v. *Pearce*, 32 L.J. M.C. 75; S.C. 3 B. & S. 531.

[6] *Buxton* v. *Gouch*, 3 Salk. 269.

the Appellate Court will pronounce the decision which it ought to have pronounced. If a court has jurisdiction to commence a case, it has jurisdiction to go wrong in it. "The question of jurisdiction does not depend on the truth or falsehood of the charge (or allegations in the plaint), but upon its nature; it is determinable at the commencement, not at the conclusion of the inquiry."[1] Nor is it any objection to the jurisdiction of a criminal court that the warrant has been illegally issued. In such a case, it was argued that a witness could not be convicted of perjury. Lopes, J., said: "Whether S. was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, was immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent, a false oath wilfully taken would be perjury."[2]

§ 309. A magistrate who records a statement under s. 164 of the Crim. P.C., has authority to take it on oath, and the statement is evidence within s. 191 of this Code.[3] A police officer who makes an investigation under Chapter XIV. of the Crim. P.C., may examine orally any person acquainted with the facts of the case. He cannot administer an oath, but as s. 161 requires the person interrogated to answer truly all questions put to him by such officer, the statements made in reply are evidence within s. 191.[4] The same principle applies to statements which are not in the nature of depositions. The plaint and written statements in a civil suit must be verified as true,[5] and come within s. 191 of this Code, as being statements which are required by law to be true.[6] The numerous statutory declarations which persons are required by law to make, for purposes of

[1] *Per* Lord Denman, C.J., *Reg.* v. *Bolton*, 1 Q.B. 66, pp. 73, 74.

[2] *Reg.* v. *Hughes*, 4 Q.B.D. 614, p. 622.

[3] *Reg.* v. *Khajabhoy*, 16 Mad. 421. So as to a statement made before a police patel under Bombay Act VIII. of 1867, s. 13, *Reg.* v. *Jobasapa*, 4 Bom. 479.

[4] *Nathu Sheikh* v. *Reg.*, 10 Cal. 405; *Reg.* v. *Parshram Ray Singh*, 8 Bom. 216. If the prosecution fail to prove that the inquiry was one conducted under chap. xiv., or that the statement was in answer to questions put by the police officer, there can be no conviction. A statement volunteered to a police officer does not come within s. 191 (*Reg.* v. *Baikanta Bauri*, 16 Cal. 349).

[5] Civ. P.C. 1882, ss. 52, 115.

[6] *Reg.* v. *Mehrban*, 6 All. 626.

customs, taxation, assessment, and the like, will also be criminal if false. On the other hand, the mere fact that a document is verified does not bring it within the terms of s. 191, unless it is required by law to be verified, or unless it is a statement which the person making it is required to make. Accordingly, false statements made in an application for rehearing of an *ex parte* decree under s. 209 of Act VII. of 1859,[1] or for a new trial in a Small Cause Court under s. 21 of the Small Cause Court Act, XI. of 1865,[2] were held not to be criminally punishable. The statements were voluntary statements of the case, which the applicant was prepared to prove. They need not have been verified, and derived no additional weight from the fact that they were so.

§ 310. Under s. 197 it is necessary to show that the statement made was contained in a certificate, which was required by law to be given or signed, or relating to any fact of which the certificate is by law admissible in evidence. All documents of which certified copies are directed to be given, come under the first head, whether the copy when so given is primary or only secondary evidence of the original.[3] Section 60 of the Registration Act of 1877, which provides that a certified copy of a registered document shall be evidence that the facts stated to have occurred at the time of registration really did occur, is an illustration of the second head.

§ 311. Under s. 199 the statement must be contained in a declaration which any court of justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact. The section is not satisfied by the fact that a person has made a statement which could afterwards be used in evidence against himself. This would be true of everything that a man says or writes.[4] Nor by the fact that he has made application to a court to take certain steps; and that this application contains statements which are false, unless the statement is in itself evidence, upon which the court is authorized to act without anything further.[5] The declaration must itself, if believed, furnish

[1] *Reg.* v. *Kartick Chander*, 9 Suth. Cr. 58.
[2] *Reg.* v. *Haran Mandal*, 2 B.L.R. A. Cr. 1; S.C. 10 Suth. Cr. 31.
[3] See Indian Evidence Act, ss. 65, 76—78; Registration Act, III. of 1877, s. 57.
[4] See *per* Phear, J., 2 B.L.R. A. Cr., p. 5; *Chandi Pershad* v. *Abdur Rahman*, 22 Cal. 131, p. 137.
[5] *Reg.* v. *Bapaji Dayaram*, 10 Bom. 288, p. 298; *re Iswar Chunder Guho*, 14 Cal. 653.

the court, or the officer before whom it is made, with a sufficient warrant to do the act which the declarant desires or assists in bringing about. Such, for instance, are the statements made under ss. 35 and 58 of the Registration Act, III. of 1877, or under the Marriage Acts, III. of 1872, s. 21; II. of 1891, s. 66.

§ 312. **Falsity of Evidence.**—The statement must be false; that is, what the witness or declarant says about it must be false, and it makes no difference that the fact really took place as he asserts it did. For instance, nothing is more common in India than to produce half a dozen witnesses to prove that a particular document was signed, or a particular payment was made, in their presence. Very often the document was really signed, or the payment was really made, but they were not there, and knew nothing about it. This is false evidence. When a judgment-creditor presented an application for execution, which by s. 235 of the Civ. P.C. he was bound to verify, and in which he alleged as due to him the whole amount of the judgment debt, without stating, as he was bound to do, the terms of an adjustment made with the judgment-debtor, and a payment received under that adjustment, it was held that he had given false evidence in a stage of a judicial proceeding, and was punishable under s. 193.[1]

§ 313. **Guilty Knowledge.**—The statement must not only be false, but it must be false to the knowledge of the person making it. That is, he must either know or believe it to be false, or he must not believe it to be true. As regards the material facts of the case, there can generally be little doubt that if the evidence is false, the witness must have known it to be so. A man who deposes to the fact of an adoption or marriage which never took place, must intend to tell a lie. On the other, where a man swears that he saw A B commit a burglary, he may be deliberately imputing to A B a crime which was, to his knowledge, committed by X or an unknown person, or he may have honestly mistaken A B for the criminal. Again, there are subjects on which a statement can only amount to an expression of opinion. A man who swears that a horse was sound when he was sold; that a man was not suffering from consumption when he effected a life insurance; that a testator was capable of making a will at the time of its execution, is

[1] *Reg.* v. *Bapaji Dayaram*, 10 Bom. 288, p. 298.

expressing a belief founded on a variety of circumstances present to his mind at the time he formed the belief. The circumstances may still be present to his mind, or they may have vanished, leaving merely the strong recollection that they had led him to a state of belief, which he has no doubt was well founded at the time. Provided he states his belief honestly, his evidence is true, although he cannot state the grounds for it, or although his reasons were erroneous, or his conclusion unsound (s. 191, Explanation 2). Where a statement involves a mixed question of law and fact, a man who is honestly mistaken in the law, and answers accordingly, is not criminally liable, on the principle that ignorance of law is no excuse. For instance, a man who honestly states that there is no legal impediment to a proposed marriage, has not given false evidence because he is about to marry his deceased wife's sister, and such a marriage is forbidden by law, if he is not aware that it is forbidden.[1]

§ 314. A very common instance of evidence which is false, merely because it is not believed to be true, arises from the inveterate habit among native witnesses of always answering with the greatest minuteness to details, which they probably never observed, and would certainly have forgotten. Statements of this sort are constantly made by witnesses, whose evidence in the main is truthful, to show the accuracy of their memory, or to strengthen the belief that they are talking of things which they really saw. It is a common mistake to disbelieve a native witness because he embellishes his facts with a fringe of fiction. A European witness who did the same would probably be absolutely unworthy of credit. It is an equally common mistake to attribute weight to discrepancies in testimony. They generally amount to little more than this, that witnesses who agree in what they really saw, vary in what it occurs to them to invent under the pressure of cross-examination.

§ 315. **Contradictory Depositions.**—The necessity of proving that any particular statement, which was charged as being false evidence, was false to the knowledge of the party making it, raised a considerable difficulty, where a defendant had made two statements so contradictory that one or other of them must be false. It might be difficult or impossible to prove which of the two was false; and if the prosecution selected one of the two as being false, the tribunal

[1] *Reg* v. *Robinson*, 16 All. 212.

which tried the case might think it was true, and acquit the prisoner. In Madras, Reg. III. of 1826 authorized the prosecution to prove the two contradictory statements, which was sufficient to secure a conviction, if the judge was of opinion that in one or other of them the defendant must have been telling a wilful untruth. A similar practice, founded apparently upon a futwah delivered in 1831, sprang up in Bengal.[1] The original draft of the Penal Code contained nothing bearing upon the subject, but the Indian Law Commissioners, in their second Report of 1847, s. 154, p. 387, expressed a strong opinion that the mere fact that a person had in any stage of a judicial proceeding given a statement on oath which directly and positively contradicted another statement similarly given, should render him liable to punishment. The Penal Code and the Crim. P.C. of 1861, which came into force on the same day, contained provisions which were apparently intended to carry out this view.[2] At first it was assumed that, even in the case of contradictory statements, it was necessary to prove which was false, and many conflicting decisions were recorded, even after a contrary ruling had been given. Finally, it was agreed by all the High Courts, that where the two statements were so irreconcilable, that one or other must necessarily be false, it was unnecessary to offer any evidence to negative either assertion.[3]

§ 316. It is hardly necessary to remark, that the mere circumstance that the same man, at different times, made contradictory statements upon the same point, is by no means conclusive proof of guilt. Either statement may have been made under the influence of forgetfulness, or misapprehension; or he may, when he made the second statement, have discovered the falsity of what he had believed to be true when he made the first statement. Still less would it be safe to convict, when each statement merely conveys an expression of opinion: for instance, as to the

[1] *Per* Duthoit, J., 7 All., p. 52.

[2] Penal Code, s. 72; Crim. P.C., Act XXV. of 1861, ss. 242, 381, 382.

[3] This was so decided upon the Crim. P.C. of 1861 by a Full Bench of the Calcutta High Court, in *Reg.* v. *Mt. Zameran*, 6 Suth. Cr. 65; S.C. B.L.R., Sup. Vol., 521, and by the Madras High Court in the case of *Palany Chetty*, 4 Mad. H.C. 51; upon the Crim. P.C. of 1872 by a Full Bench of the Calcutta High Court, *Reg.* v. *Mahomed Humayoon*, 13 B.L.R. 324; S.C. 21 Suth. Cr. 72; upon the Crim. P.C. of 1882 by the High Court of Allahabad, *Reg.* v. *Ghulet*, 7 All. 44, and by the Bombay High Court, *Reg.* v. *Ramji Sajabarao*, 10 Bom. 124.

identification of property, or the similarity of handwriting. The statements must relate to matters so necessarily within the knowledge of the party on both occasions, that one or other statement must have been known to be false when it was made. For instance, if a man were at one time to swear that he had been beaten and robbed, and at another time were to swear he had neither been beaten nor robbed, either assertion may be true, but he must have known one or other to be untrue. In charges founded upon supposed contradictory statements, every presumption in favour of the possible reconciliation of the statements must be made.[1]

§ 317. It will be observed that the form of charge given for such cases,[2] though it comes under the list of charges with two or more heads, differs from all the other forms in the same list in this respect: they charge the same transaction as possibly constituting one or other of different offences. It charges two transactions, either of which may be innocent, as establishing that by means of one or other of them, it is immaterial which, he has committed the single offence charged. "The course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, when taken in combination, disclosed the specific offence of intentionally giving false evidence."[3] Accordingly, it has been held in Bombay that each of the statements relied on must be sufficient to constitute the offence charged. A charge alleged a false statement made to a public officer, and a contradictory statement on oath made to a magistrate, and alleged that by virtue of such statements he had committed an offence punishable under s. 182 or 193. It was held that if it was intended to charge two offences in the alternative, the charge was bad as not being framed in accordance with s. 233 of the Crim. P.C., 1882. But if the charge was to be taken as framed under Sched. v., xxviii. (ii.) 4, then there could be no conviction, as a false statement under s. 182 could not constitute an offence under s. 193, or *vice versâ*. Wedderburn, J., said: "He cannot successfully be charged under s. 193 of the Indian Penal Code, because he

[1] *Reg.* v. *Bidu Noshyo*, 13 B.L.R. 325; *Reg.* v. *Nomal*, 4 B.L.R. A. Cr. 9, 12; S.C. 12 Suth. Cr. 69; *Reg.* v. *Ghulet*, 7 All. 44; *Nathu Sheikh* v. *Reg.*, 10 Cal. 405; *Reg.* v. *Ramji Sajabarao*, 10 Bom. 124.

[2] Crim. P.C. 1882, Sched. v., Form xxviii. (ii.) 4.

[3] *Per* Morris, J., 13 B.L.R., at p. 335; S.C. 21 Suth. Cr., at p. 75.

only gave one deposition in which there are no discrepancies; and, similarly, he cannot be charged under s. 182, for he only once gave information to a public servant."[1] Nor can separate charges be framed for each offence, for unless there is evidence as to the falsity of either statement, both must fail.[2] It certainly seems to me that this mode of charging two contradictory statements, made at different times, as making out a single offence, does not come within the terms of s. 72 of the Penal Code. It would be impossible under that section to charge two different acts of housebreaking on different nights, and to conclude that by means of one or other of them the accused committed an offence under s. 456. The whole procedure seems to rest on the fact, that the particular form which authorizes such a mode of charge is contained in the schedule to the Crim. P.C., and is sanctioned by s. 554.

§ 318. Where it is intended to support a charge of false evidence, by proving contradictory depositions given before different tribunals, the proper sanction must be obtained for a prosecution on each branch of the alternative.[3] And similarly, there must be a sufficient committal to justify an independent trial for each false statement.[4]

§ 319. **Fabricating False Evidence.**—The offence of fabricating false evidence under s. 192 involves three elements: (1) the causing the existence of any circumstance, or making any false entry, or any document containing a false statement; (2) with the intention that it may appear in evidence in a judicial proceeding, or a proceeding taken by law before a public servant as such, or before an arbitrator; (3) in order to cause any person whose duty it is in such proceeding to form an opinion upon the evidence, to arrive at an erroneous opinion on any point material to the result of such proceeding.

A person who put stolen goods in a man's box, with a view to bringing a false charge of theft against him;[5] or who altered the position of a Government boundary stone,

[1] *Reg.* v. *Ramji Sajabarao*, 10 Bom. 124, at p. 129; *Reg.* v. *Bharma*, 11 Bom. 702.

[2] *Reg.* v. *Mugappa*, F.B. 18 Bom. 377.

[3] *In re Balaji Setaram*, 11 Bom. H.C. 34.

[4] So held with reference to Act XXV. of 1861, s. 172. See Crim. P.C. 1882, ss. 477, 478; *Reg.* v. *Mati Khowa*, 3 B.L.R. A. Cr. 36; S.C. 12 Suth. Cr. 31; *Reg.* v. *Nomal*, 4 B.L.R.A. Cr. 9; S.C. 12 Suth. Cr. 69.

[5] *Reg.* v. *Soonder Putnaik*, 3 Suth. Cr. 59.

with a view to proceedings affecting the limits of his land; or who changed the contents of a bag of samples, which was to be produced in a suit on a warranty,[1] would be causing a circumstance to exist within the meaning of s. 192. The insertion in an account-book, which is admissible evidence under the Evidence Act, s. 34, that money had been received or paid; or the entry in a revenue record that a particular person was in possession of land, or had paid revenue in respect of it, would be similarly punishable. Anything is a false statement which embodies a fact capable of being used in evidence; and anything under s. 29 is a document upon which such matter is capable of being visibly expressed. A claimant, in a pedigree case, who substituted for a genuine tombstone a false one, which contained an untrue statement as to a marriage, a birth, the date of a death, or the like, would also be making a document containing a false statement. Where a person at the instigation of the defendant applied to a stamp vendor for a stamp, giving his name as Chatter Singh, and thereby procured the usual endorsement to be made on the stamp, showing a sale to Chatter Singh, in order to use it in subsequent proceedings against him; it was held that the defendant had thereby fabricated false evidence.[2]

§ 320. The intention must be that the thing so fabricated should be used as evidence, and this intention must have existed at the time of the fabrication.[3] It must therefore be something capable of being so used. False statements contained in mere applications to a court or public officer, which are not in themselves evidence of the facts they assert, do not come within this section.[4] A police officer suppressed certain reports, and then made an entry in his diary that he had forwarded them, no doubt with the intention of producing the entry as evidence in his own behalf if any charge was brought against him. It was held that this was not an offence within s. 192, as the entry, though admissible against him, could not have been used for him.[5] The entry might have been very much in his favour in the event of a merely departmental inquiry, but

[1] *Reg.* v. *Verones* (1891), 1 Q.B. 360.
[2] *Reg.* v. *Mula*, 2 All. 105.
[3] *Lakshmaji* v. *Reg.*, 7 Mad., at p. 290.
[4] *Reg.* v. *Kartick*, 9 Suth. Cr. 58; *Reg.* v. *Haran*, 2 B.L.R. A. Cr. 1; S.C. 10 Suth. Cr. 31.
[5] *Reg.* v. *Gauri Shanker*, 6 All. 42.

this would not come within the section as "a proceeding taken by law before a public servant." It is not, however, by any means clear that the defendant could not have managed to get the Court to look at the entry as corroborative evidence, or as showing the course of proceedings in his office, and, if received, it would have been very material. A witness may be indicted for giving evidence that is false, though, as a matter of law, it ought not to have been admitted.[1]

§ 321. Where it is not the intention of the accused to use the fabricated evidence in a judicial proceeding, the nature of which is discussed hereafter (§§ 325—327), or before an arbitrator, it must be intended to be used in a proceeding taken by law before a public servant as such. Where the lessee of a forest presented false accounts to a forest office in order to defraud the Government, it was held that he had not committed an offence within the meaning of s. 192. The Court said: "It does not appear that the forest officer was empowered by law to hold an investigation and take evidence in any matter at all. His functions seem to be purely ministerial, and no proceedings, by way of investigation, being provided for and regulated by law, the statement laid before him, though false, would not be false evidence fabricated so as to expose the fabricator to the penalties of s. 193."[2]

§ 322. Finally, the object of the fabrication must be to cause any person—whether judge, juryman, or assessor—who had in the proceeding to form an opinion upon the evidence, to entertain an erroneous opinion upon some point material to its result. Not, be it observed, upon the ultimate result, but upon some point material to the result. For instance, suppose the issue to be decided was, whether the defendant had paid a particular debt, which he had in fact paid, and that, to strengthen his case, he inserted in his books a false entry of the payment. The result would be to induce the judge to come to a perfectly sound view on the issue itself, viz. whether the payment had in fact been made But he would have been led to an erroneous opinion as to a point material to the result, viz. whether the defendant's books contained such an entry as might naturally be looked for under the circumstances. Where a person who

[1] *Reg.* v. *Gibbons*, 31 L.J. M.C. 98; S.C. L. & C. 109.
[2] *Reg.* v. *Ramajirav*, 12 Bom. H.C. 1, at p. 6.

wished to register a document altered its date, so that it might appear to be presented in proper time, this was held to be an offence within the section, as the object was to induce a public servant to act differently from the way in which he ought to act, in a proceeding taken before him by law.[1] On the other hand, where a Vakil filed in a civil suit a Vakalutnamah, which contained a statement that it was signed in the presence of the Adighari of the Amshom, and purported to be signed by him; and it appeared that the Vakalutnamah was really given by the client, but that the attestation was falsely added by the Vakil, to make the Vakalutnamah admissible according to the rules of practice; it was held that a conviction under s. 192 could not be maintained. The Vakalutnamah was not evidence in the case, and the error, if any, induced in the mind of the Court as to its genuineness or admissibility, could not affect the decision of the case.[2]

§ 323. The following facts appeared in a case decided by the Allahabad: The purchaser of land obtained a registered deed of sale in which the property was rightly described by its boundaries, but its revenue number was wrongly stated as 10 instead of 272. Subsequent to registration the vendee altered the number from 10 to 272, and produced the deed so altered as evidence in a suit in which the vendor had sued him for this very land, claiming it as his property under the number 272. The vendee established his claim, and upon the alteration being discovered, he was indicted under ss. 471 and 193. The High Court held that the conviction could not be sustained under either section, inasmuch as there was no such fraud as was essential to constitute forgery, nor any intention to cause any person to entertain an erroneous opinion touching any point material to the result of a proceeding, which was essential to make out an offence under s. 193 or s. 196.[3] It was admitted that the case would have been different, if the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to convey. The Court, however, seems to have been of opinion that, as the property was completely identified by boundaries, the insertion of the number, whether right or wrong, was merely immaterial. On the

[1] *Reg.* v. *Mir Ekrar*, 6 Cal. 482.
[2] *In re Keilasum Putter*, 5 Mad. H.C. 373.
[3] *Empress* v. *Fateh*, 5 All. 217.

other hand, it is obvious that considerable doubt would have been thrown upon the title, if the title-deed professed, upon its face, to refer to a different piece of land, and that it was very material to the result of the proceeding to alter the number so as to remove this doubt. Supposing it shown that the number was altered in order to improve the title-deed as evidence in the event of proceedings commenced or contemplated as likely, it seems to me, with great respect, that a conviction under s. 193 or s. 196 would have been correct. If the alteration was merely made so as to remove what might be a blot upon the title in case of a future mortgage or sale, then, I think, no offence would have been committed. The date at which the alteration was made does not appear in the case.

§ 324. It is not necessary, in a charge, based upon s. 192, to show that any actual use has been made of the evidence so fabricated. The mere fabrication is punishable under s. 193. The use of the fabricated article is punishable under s. 196.

It will be remarked that the same element of materiality, which is essential to the offence defined by s. 192, is also introduced into the subsequent sections (197—200). On the other hand, the offence of giving false evidence, as defined by s. 191, is made to consist in giving *any* false statement, and nothing is said as to its being a statement material to the point. The omission is evidently intentional, since in the original draft (s. 188) the words "touching any point material to the result" were introduced. And so it has been ruled, that the materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence under ss. 191 and 199.[1] Where, however, a criminal indictment is based upon a false statement as to a wholly immaterial fact, it will often be successfully contended that the knowledge of its falsity, which is necessary to secure conviction, has not been made out. Where a party deliberately makes an untrue statement as to a very material circumstance, to which his attention is likely to have been directed, and when this false statement is for his own benefit, or for that of the person calling him, it may be assumed that he knew he was deposing falsely. But no such presumption can arise where the point was irrelevant,

[1] *Reg.* v. *Aidrus*, 1 Mad. H.C. 38; *Reg.* v. *Parbutty*, 6 Suth. Cr. 84; *Reg.* v. *Shib Prosad*, 19 Suth. Cr. 69.

and one upon which he might have answered either way, with equal absence of result. In such a case a court would seldom be justified in exercising the powers of committal vested in it by the Crim. P.C., s. 195.

§ 325. **Judicial Proceeding.** — Under s. 193 the punishment for giving or fabricating false evidence in any stage of a judicial proceeding is heavier than when it is given in any other case. The phrase is borrowed from English law, which made it one of the elements of perjury that the oath had been taken in a judicial proceeding.[1] Hawkins says upon this: "It seems to be clearly agreed that all such false oaths as are taken before those who are in any ways entrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries." "And it is said to be no way material, whether such false oath be taken in the face of a Court, or by persons authorized by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and therefore, that a false oath before a sheriff, upon a writ of inquiry of damages, is as much punishable as if it were taken before the Court on trial of the cause."[2] In the earliest case in which this question arose, Scotland, C.J., in the course of argument, asked counsel to define a judicial proceeding. The answer was, "Any step which the Court may take from the commencement of a suit to its termination." This definition was accepted in the judgment as correct. The Chief Justice said: "It is nothing more nor less than a step taken by the Court in the course of the administration of justice, in connection with a case pending."[3] The question there arose in a civil suit, in which all the proceedings from first to last are under the control of a single court. The definition would have to be extended to meet the case of criminal proceedings, which are conducted by a series of authorities before the court of trial. With this view, a judicial proceeding might be defined as "any step in the lawful administration of justice, in which evidence may be legally recorded for the decision of the matter in issue in the case, or of any question necessary for the decision or final disposal of such matter." In the Madras case above referred to, where it appeared that the

[1] *Per* Lord Mansfield, *R.* v. *Aylett*, 1 T.R. 63.
[2] 1 Hawk. P.C. 430.
[3] *Reg.* v. *Venkatachellum Pillai*, 2 Mad. H.C. 43, pp. 45, 56.

bailiffs of a court, twelve in number, were constantly called upon to give evidence as to the service of summonses in the different cases before the Court, and that it was the practice to call them all up at the beginning of each day, and to affirm them solemnly to give true evidence in all the cases coming before the Court that day, and one of the bailiffs at a later period of the day gave false evidence, it was held that he was properly convicted under s. 193, the affirmation being administered in "a stage of a judicial proceeding." So false evidence given upon an application for bail,[1] or as to facts which had to be proved in order to admit secondary evidence of a document,[2] would be similarly punishable. If after a prisoner was convicted, evidence was offered that he had been previously convicted, in order to enhance the punishment under s. 75 of this Code, that again would clearly be a stage of a judicial proceeding, just as much as proceedings in execution in a civil suit. So it was held that where a police-inspector was conducting an inquiry into infractions of the salt laws, preliminary to a proceeding before a court of justice, this was a stage of a judicial proceeding.[3] It would, however, be otherwise where the inquiry was conducted for some purpose wholly unconnected with the judicial proceedings. For instance, where a magistrate received an anonymous letter, charging some persons with murder, and took evidence, not for the purpose of tracing the murder, but of ascertaining the author of the letter, it was held that the inquiry was not a "stage of a judicial proceeding," and that a conviction under s. 192 could not be sustained.[4] And. similarly, where the object of the inquiry was to discover the genuineness of the statements made by the heir of a deceased person to the telegraph authorities, claiming money due to the deceased;[5] or where the proceedings were wholly without jurisdiction. Two prisoners were acquitted on a charge of murder. Pending an application by the Government for a new trial, the police apprehended the accused, and brought them before the magistrate, who, in order to prevent them from absconding, if the appeal should be decided against them, ordered

[1] 1 Hawk. P.C. 430.

[2] *Reg.* v. *Phillpotts*, 2 Den. C.C. 302; S.C. 21 L.J. M.C. 18.

[3] *Reg.* v. *Soonder Putnaik*, 3 Suth. Cr. 59. The report gives no information as to the nature of the inquiry, or the authority under which it was conducted.

[4] *Reg.* v. *Bykunt*, 5 Suth. Cr. 72.

[5] *Reg.* v. *Chaitram*, 6 All. 103.

them to be detained in custody. He had no power to issue any such order. It was held not to be a judicial proceeding.[1]

§ 326. The Crim. P.C., s. 4 (*d*), defines a judicial proceeding as meaning "any proceeding, in the course of which evidence is or may be legally taken." This definition, however, is only applicable for the purposes of the Procedure Code, and is not a definition of the term "judicial proceeding" in ss. 192 and 193 of the Penal Code. For instance, statements made to a registrar of deeds, under Act III. of 1877, to a police officer under the Crim. P.C., s. 161, to a magistrate under s. 154, if false, are punishable as false evidence under the second clause of s. 193 (see *ante*, § 309), but not under the first. A registrar performs a purely ministerial duty, and though it is necessary that he should ascertain certain facts as a preliminary, this does not convert his function into a judicial proceeding.[2] So statements made under ss. 161, 164, though lawfully required, are not themselves evidence, either in the preliminary inquiry, or the final trial; and the investigation made in either case is not a judicial proceeding.[3]

§ 327. An inquiry under the Legal Practitioners' Act, XVIII. of 1879, is a judicial proceeding;[4] and so is one under the Coroners' Act, IV. of 1871, s. 8. The proceedings of a coroner are in their nature regular criminal proceedings, having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. There is nothing in common between a coroner's inquest and the inquiry into the cause of the death of a person who has died in the custody of the police, which is directed by the Crim. P.C., s. 176. No finding or report is required by the section, and if any report is made by the magistrate, it is not a judicial proceeding.[5] Nor is an attachment of property by a magistrate under s. 88 of the Crim. P.C. a judicial proceeding, as he is not required to make any investigation.[6]

[1] *Reg.* v. *Gholam Ismail*, 1 All. 1.
[2] *Reg.* v. *Tulja*, 12 Bom. 36, p. 41.
[3] *Reg.* v. *Ismal*, 11 Bom. 659; *Reg.* v. *Bharma*, 11 Bom. 650.
[4] *Subba Chetti* v. *Reg.*, 6 Mad. 252.
[5] *Re Troylokanath*, 3 Cal. 742, p. 752, on the corresponding section of Act X. of 1872, s. 135.
[6] *Reg.* v. *Sheodihal*, 6 All. 487.

§ 328. Several false statements in the same deposition only amount to one offence. "Testing it by the law of evidence the whole deposition must be looked at, if desired, and one part qualified by the other. The falsity of the second statement was proper evidence on the first trial, but there were not two offences."[1]

§ 329. **Proof of False Statement.**—Where the false statement is contained in a document signed by or on behalf of the accused, such as a verified statement, or affidavit, the original document must be produced, and the signature proved. A certified copy will not do, unless under circumstances which admit of secondary evidence. Even then the mere production of a certified copy is insufficient. It only proves that there was once on the record an original corresponding with the copy. Further evidence will be necessary to connect the defendant with the original, and to show that he actually signed it, and knew its contents. Mere signature is, in the case of an adult male, sufficient to bind him in civil suits; but in a criminal case it would be necessary to give at least *primâ facie* evidence of actual knowledge of the contents. This would especially be so in the case of legal documents, which are generally prepared by a Vakil or Mukhtar, and signed on trust. Where the document avowedly comes from an agent, the strictest proof would be necessary, not only that the agent was authorized to sign that class of document, which again would be sufficient in civil suits; but that the contents of the particular document were known to, and understood, and authorized by, the principal. Where the agency is created by writing, the production of the original Mukhtarnamah is indispensable, if any reliance is to be placed upon the general authority, as distinct from the special recognition of it in the particular instance.

§ 330. Where the false evidence is given in a statement or deposition, the actual evidence consists in the words the man used, as he uttered them, not in the formal deposition, if any, in which they are recorded. It is sufficient to prove his words by the oath of any one who heard and can remember them. It is not necessary that the witness should remember the whole statement, but he must remember enough to be certain that there was nothing said to alter or qualify what is remembered.[2] Where a deposition has

[1] 6 Mad. H.C. Rulings 27.

[2] *R.* v. *Rowley*, 1 Moo. C.C. 111; *R.* v. *Munton*, 3 Cr. P. 498.

been taken down in writing, the proper mode of proof is to call the clerk who took it down, who will be able to swear that he took it down correctly, and that it contains what the witness said. If necessary, he may use the deposition to refresh his memory as to what the witness actually said.[1] Sometimes, however, what the witness said in one language was interpreted to the clerk in another language, in which he wrote the deposition. It will then be necessary to call the interpreter, to prove that the words he gave to the clerk correctly represented those used by the witness. Where the document has been read over to the witness, acknowledged by him as correct, and signed by him, this should also be proved. In a case where the only evidence offered for the purpose of satisfying the Court, that a deposition taken in English represented a true translation of the words which the accused person actually spoke in Hindustani, was the memorandum at the foot of the deposition signed by the magistrate in these words: "The above was read to the witness in Hindustani, which he understood, and by him acknowledged to be correct;" Phear, J., held that, under s. 80 of the Evidence Act, the English deposition was probably evidence, upon which alone the jury could lawfully act, of what the prisoner had said in Hindustani. At the same time, he commented on its unsatisfactory character, and said it would have been only fair to the prisoner that the person who took down in English what the prisoner had said in Hindustani, should have been examined as a witness, that the prisoner might have an opportunity of cross-examining him.[2] In another case, where exactly the same evidence was given, Jackson, J., said: "The evidence as to the prisoner's deposition before the Assistant Commissioner is, in fact, no evidence at all."[3] Where anything turns upon the special words of the written deposition, such meagre evidence, if technically admissible, is eminently unsatisfactory. It must be remembered that such a deposition, when taken in the narrative form, does not even profess to repeat *verbatim* what the witness had said. It is a compound of the question put in the words of the examining counsel, and of the answer in the words of the witness. The statement as finally recorded is often the result of an animated discussion between the clerk, the counsel and the judge, not

[1] Ind. Evidence Act, s. 159. [2] *Reg.* v. *Gonowri*, 22 Suth. Cr. 2.
[3] *Reg.* v. *Mati Khowa*, 3 B.L.R. A. Cr. 36; S.C. 12 Suth. Cr. 9. See *Reg.* v. *Fatik Biswas*, 1 B.L.R. A. Cr. 13.

as to what the witness said, but as to what he meant to say. When the recorded evidence is read out to him, he soon finds that he can hardly recognize any of the language he really used in what has been put down. His admission that it is correct, if anything more than a matter of politeness, is really only an admission that the story is itself correct, though he could never have got it into those words.

§ 331. It is necessary to give sufficient proof, not only of the words used and of their falsity, and of the defendant's knowledge that they were false, but also of the circumstances which raise mere lies into a criminal offence. These circumstances have been already stated. The most important is the competence of the person before whom the evidence was taken. So much of the proceedings as show the origin of the case, and that the officer had jurisdiction to deal with it, must be put in. For instance, the plaint in a civil suit, the proceedings on committal, and the charge in a criminal case; the reference to arbitration, and the civil proceedings, if any, which preceded the arbitration, where the false evidence was given before an arbitrator. Where the statement has been made on a police inquiry, it must be shown how the inquiry was being made, and that the statements were not volunteered, but in reply to questions.[1] Where any question as to materiality can arise, it is necessary, and in all cases it is advisable, to produce the plaint, written statements, issues, and judgments, so as to show the bearing of the evidence, and what the witness came to swear to.[2] And, similarly, where it is alleged that the evidence was given in a stage of a judicial proceeding, all the proceedings ought to be produced to enable the Court to judge of their character.

§ 332. It is a long-established rule in England that a conviction for perjury cannot be rested upon the uncorroborated evidence of a single witness. Either there must be a second witness, or the testimony of the single witness must be supported by some material fact tending to prove the guilt of the accused. This rule was recognized by Act II. of 1855, s. 28, which, after laying down that "except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact," went on to enact that "this provision

[1] *Reg.* v. *Baikunta Bauri*, 16 Cal. 347.
[2] *Reg.* v. *Carr*, 10 Cox, 564.

shall not affect any rule or practice of any court that requires corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury." In 1866 it was decided by a Full Bench of the Calcutta Court that this act was binding on the Mofussil courts as well as on those created by Royal Charter, and it was pointed out that the rule had been in force in the Nizamut courts of Bengal before 1855.[1] The Act of 1855 was repealed by the Indian Evidence Act, and s. 134 of the latter Act declares that "No particular number of witnesses shall in any case be required for the proof of any fact." It is probable that cases seldom arise in which a charge of giving false evidence would be based upon the evidence of a single witness without any circumstance of corroboration. In some cases such evidence might be completely satisfactory. If a cooly swore that he saw the Commander-in-Chief pick a pocket, the evidence of the latter, unless some suspicion rested on his sanity, would be amply sufficient to warrant a conviction. Where, however, two contradictory statements, either of which might conceivably be true, are sworn to by a single witness on each side, a civil court would necessarily have to accept one statement and reject the other. But a very different degree of belief is required to arrive at a conviction of either witness for perjury. The Court would probably follow the same course that the Indian courts have adopted in the case of accomplices (*post*, § 737); they would treat the necessity for corroboration, not as a rule of law, but as a maxim of prudence, founded on long judicial experience, and would advise the jury, that where it was a mere case of oath against oath, it would be unsafe to convict either witness, merely because his story appeared less credible than that of the other.

§ 333. **Using False Evidence.**—As it is criminal to give or fabricate false evidence, so it is to make use of such false or fabricated evidence, knowing its false character. On a charge under s. 196, the first thing is to show that the evidence was false or fabricated, and next to establish a guilty knowledge. The latter point will generally be established by the mere fact that the party has produced the false evidence, at all events to the extent of throwing upon him the burthen of showing that he did so, not corruptly but honestly. The law upon this point was laid

[1] *Reg.* v. *Lal Chand Kowrah*, 5 Suth. Cr. 23; followed in 1872, *Reg.* v. *Ramlochun Singh*, 18 Suth. Cr. 15.

down by Sir Adam Bittleston in *Reg.* v. *Gungammah* [1]:—"If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is, evidence on which a jury may find that he solicited them; but the jury must be satisfied that he knew that the statement which they were called to make must be untrue to their own knowledge." It is not sufficient that he should know or believe the statement to be untrue. It is necessary that the witnesses should have the same knowledge, for, otherwise, the evidence is not false.

§ 334. If the evidence was fabricated, and was known to be so, it is immaterial that it was not originally fabricated for the purposes of the proceedings in which it was so used.[2] In this case the document which was used before the civil court had been fabricated for use before the registrar.

A curious point was raised, though not decided, in the above case: whether a false document, which had originally been prepared without the intention of using it as evidence, could be considered as fabricated evidence, if afterwards used as evidence. The argument was, that when it was prepared it was not fabricated evidence, and when it was used as evidence it was not fabricated. Exactly the same point would arise under s. 471, if a document, to which a false signature had been appended for some purpose, which was neither fraudulent nor dishonest, and was therefore not a forgery under s. 464, was afterwards fradulently passed off as genuine by the original maker. Suppose, for instance, that a person who was fond of imitating handwriting amused himself by signing a friend's name to a receipt or a cheque; that he threw the papers aside, and afterwards finding them, used the receipt as evidence of a debt, and presented the cheque at the bank. Could he be convicted under s. 471? If anything was added to the document at the time of using it, such as a stamp, a date, or a sum of money, he certainly could be convicted. If the papers were presented exactly as originally framed, it might be different. The case is never likely to occur. If it did, the defendant would probably find it difficult to establish the original purity of his motives. A charge of using in a civil suit as

[1] 3rd Madras Sess., 1860. [2] *Lakshmaji* v. *Reg.*, 7 Mad. 289.

genuine a document which was known to be forged, is an offence cognizable under s. 471, and should be charged as such. A magistrate has no jurisdiction to deal with it himself under s. 196.[1]

§ 335. In cases under s. 181, for giving false statements on oath to a public servant, it is necessary to prove that the person accused was legally bound by an oath, which the public servant was authorized to administer (*ante*, §§ 308, 309), and that his statements were false to his knowledge (*ante*, §§ 313, 314).

The Madras High Court have held that a witness in a criminal case who gives false evidence before a magistrate, may be convicted by a magistrate under s. 181, though he might also have been charged under s. 193, and, if so charged, would only have been triable by the Sessions Court.[2] An opposite decision has been arrived at by the Bombay High Court[3] and by the Calcutta High Court.[4] The latter ruling seems to me to be the sounder. It is based upon the general principle that where a greater offence includes a lesser, a magistrate may not give himself jurisdiction over the case by dealing with it in its minor aspect, instead of committing it for trial to an authority capable of dealing with the more serious form.[5]

§ 336. **Causing disappearance of Evidence, or giving False Information.**—Besides the sections which relate to the giving of false evidence, there are some subsidiary sections relating to analogous offences, of which s. 201 is the most important. The first essential to a conviction under this section is to prove that there was an offence actually committed; that the accused knew, or had, as a reasonable man, sufficient reason to believe that the offence had been committed, and that he took the steps alleged for the purpose of screening the offender. A mere belief that there had been a crime, however well founded, or however strongly entertained, is not sufficient.[6] It has been held in Calcutta that it is not

[1] *Empress* v. *Kherode*, 5 Cal. 717.

[2] 4 Mad. H.C. Rulings xviii., confirming a previous ruling of 26th November, 1867.

[3] *R.* v. *Dyalji*, 8 Bom. H.C. CC. 21.

[4] *Reg.* v. *Shamachurn*, 8 Suth. Cr. 27; *Reg.* v. *Heeramun*, *ibid.* 30; *Reg.* v. *Nussurooddeen*, 11 *ibid.* Cr. 24.

[5] See *Reg.* v. *Ramtahal*, 5 Suth. Cr. R. 65; *Empress* v. *Kherode*, 5 Cal. 717.

[6] *Reg.* v. *Subbramanya Pillay*, 3 Mad. H.C. 251; *Reg.* v. *Abdul Kadir*, 2 All 279: *Matuki Misser* v. *Reg.*, 11 Cal. 619.

necessary to show that the person intended to be screened was actually guilty of the offence.[1] The offender must be a person different from the person who screens him. The actual criminal cannot be charged with screening himself from prosecution, either by causing evidence to disappear,[2] or by making false statements inculpating another in order to exculpate himself.[3] Nor can a person who is charged with both the principal crime, and with getting rid of the evidence of it, be punished on both charges.[4] But a person who has been innocently present at the commission of a crime—as, for instance, murder—may be charged with the offence of concealing the body.[5] In that case it appeared that he was frightened by the actual criminals into helping them to hide the evidence of their act; but it would have been equally within the section if he had done so voluntarily, knowing that by screening them he was also helping to keep himself from suspicion.

§ 337. Where the charge is founded upon an allegation that the accused had caused evidence of the commission of the offence to disappear, it must be shown that what was caused to disappear was something which, if it had remained as it was, would have been evidence.[6] In one case it appeared that *Kishna* and *Bhikan* had murdered Jiwan in Bhikan's field. Kishna was convicted of the murder, and also under s. 201 for having carried the corpse out of Bhikan's field, and left it on the land of the murdered man. Pearson, J., said: "He did not, by removing the corpse of Jiwan from one field to another, cause any evidence of Jiwan's murder, which that corpse afforded, to disappear. His object may have been to divert suspicion from himself or from Bhikan, but his act does not constitute the offence defined in s. 201."[7] He certainly did not cause the evidence that Jiwan was murdered, derivable from the fact that Jiwan was a corpse, to disappear; but he undoubtedly caused the disappearance of the evidence that Bhikan was the murderer, derivable from the fact that the corpse was found in his field.

[1] *Reg.* v. *Hurdut Surma*, 8 Suth. Cr. 69. See the question discussed, *ante*, § 253.

[2] *Reg. v. Ramsoondar*, 7 Suth. Cr. 52; *Reg.* v. *Kashinath*, 8 Bom. H.C. C.C. 126; *Reg.* v. *Dungar*, 8 All. 252; *Torap Ali* v. *Reg.*, 22 Cal. 638.

[3] *Reg.* v. *Behala Bibi*, 6 Cal. 789.

[4] *Reg.* v. *Ramsoodar*, *ub. sup.*; *Reg.* v. *Lalli*, 7 All. 748.

[5] *Reg.* v. *Goburdhun*, 6 Suth. Cr. 80.

[6] *Reg.* v. *Lalli*, 7 All. 748.

[7] *Reg.* v. *Kishna*, 2 All. 713.

§ 338. Where the charge of giving false information is framed under s. 203, it is unnecessary to prove any particular intention;[1] but it is still necessary, as under s. 201, to prove that an actual offence had been committed, and that the accused knew, and had reason to believe in, its commission.[2] The same remarks apply to s. 202, where the offence consists in intentionally omitting to give information which the person is legally bound to give. It is only necessary to refer to the observations contained in §§ 243—246, *ante*, as to the latter point. As to the somewhat similar sections (213 and 214) see *ante*, §§ 252—258.

As to the necessity for sanction in case of proceedings for giving and fabricating and making use of false evidence, see the remarks on the Crim. P.C., s. 195 (*b*), *post*, § 711. As to the power of sessions or other courts to deal with such offences when committed before themselves, see ss. 477, 478 and 487 of the Crim. P.C., and *post*, § 727.

§ 339. **Fraudulent Transfers and Suits.**—Sections 206, 207, and 208 aim at rendering criminal all contrivances by which the owner of property withdraws it from liability to seizure under a sentence or judgment of court. Of these three no difficulty, except one of fact, is likely to arise under s. 208. It is impossible that any one can allow a decree to be passed, or process to be executed against him, for property which is his own, or money which is not due by him, except to cheat some one else. Where he does so, it is not necessary to allege or prove any special intention. The offence consists in a fraudulent employment of the machinery of the court. Nor, again, can there be any legal difficulty under s. 207, supposing the facts to be established. It is different with s. 206, where the accused is an owner dealing with his own property, and where acts which would otherwise be innocent, are rendered criminal, if done for certain specified purposes, and with that state of mind which is described by the word "fraudulently." Both elements must co-exist, but the most difficult question will commonly be, What constitutes fraud? Upon this point it may safely be asserted, that something will be necessary beyond that general flavour of deception which pervades every transaction, where the appearance and the reality do not correspond. *Benami* transactions are so universal among the

[1] *Reg.* v. *Cheetour*, 1 Suth. Cr. 18.
[2] *Reg.* v. *Joynarain*, 20 Suth. Cr. 66.

natives of India, that they have received recognition from the highest tribunals, and are now regulated by a well-defined system of rules.[1] Probably the best guidance will be found in that large body of decisions which sprang from the English statute 13 Eliz., c. 5, and which are discussed in the notes to *Twyne's* case.[2] It is certain that nothing will be considered fraudulent under s. 206, which has been held not to be fraudulent under that Act, though it is possible that transactions which are liable to be set aside under the statute of Elizabeth may not necessarily be treated as criminal under the Penal Code.

§ 340. Statute 13 Eliz., c. 5, recites that gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of fraud, malice, covin and collusion, to delay, hinder or defraud creditors or others of their just and lawful actions, suits, debts, etc., and then declares that all such transactions made for any of the above intents, shall be utterly void as against persons whose suits, etc., are, or might be, in anywise disturbed, hindered, delayed or defrauded. By s. 5, this provision is declared not to apply to any conveyance made to any person, who takes it *bonâ fide* for valuable consideration, without notice of the fraud intended. This statute has been declared by Lord Mansfield to enact nothing beyond what would have been attained by the common law.[3] As embodying sound principles of justice and equity, it has been adopted as a rule of decision by the Indian courts, in districts where the statute itself is not in force;[4] and as regards transfers of immovable property, it and the cognate statute 27 Eliz., c. 4, have been almost literally copied in s. 53 of the Transfer of Property Act, IV. of 1882. It may safely be assumed that the framers of the Penal Code had in view the statute itself, and the decisions upon it, and that they intended to give it a sanction by means of the criminal law.

§ 341. **English Decisions.**—A conveyance will not be fraudulent merely because it deprives another of a security which he would otherwise have had, if that is not the object of the act. For instance, there will be no fraud in a sale by a debtor of his landed property for a fair and adequate

[1] See Mayne, Hindu Law, chap. xiii. [2] 1 Smith, L.C. 1.
[3] *Cadogan* v. *Kennet*, Cowper, p. 434.
[4] *Per* Lord Fitzgerald in P.C., *Abdul Hye* v. *Mir Mohammed*, 10 Cal. 616, at p. 624; S.C. 11 I.A. 10, p. 18; *per* West, J., 11 Bom., p. 675; *per* Sargent, C.J., 13 Bom. 300.

consideration, though it will, of course, be much less convenient to the creditors to pursue the purchase-money than the property. And it would make no difference whatever that the debtor was actually in the throes of a lawsuit. For he is not bound to keep his property in one form rather than another for the convenience of his creditors. And in England it has been repeatedly held that the fact of such a sale having been effected when an immediate execution was anticipated will not vitiate the sale. In one of the late cases upon the point, it appeared that a tradesman, expecting the execution of a writ issued out of the Court of Chancery for payment of costs of a suit, effected a sale of the whole of his furniture and stock in trade. The only document which passed was a receipt for the purchase-money. A few days after the purchaser had taken possession, a writ was issued, and a suit was brought by the sheriff to decide whether the sale was fraudulent. *Kindersley*, V.C., said:—

"At the present day, whatever fluctuations of opinion there may have been in the courts of this country as to the construction of that statute,[1] it is not a ground for vitiating a sale that it was made with a view to defeat an intended execution on the goods of the vendor, the subject of the sale, supposing it was in all other respects *bonâ fide*. The case of *Wood* v. *Dixie*[2] has settled that at law in the most solemn manner, on a motion for a new trial. With respect to the question whether the sale was *bonâ fide*, it was at one time attempted to lay down rules that particular things were indelible badges of fraud; but in truth every case must stand upon its own footing, and the Court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration."[3] And it makes no difference that the sale was of all that the debtor possessed. In *Alton* v. *Harrison*,[4] Giffard, L.J., said: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth, whether the deed deals with the whole, or only a part of the grantor's property. If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under

[1] 13 Eliz. c. 5.

[2] 7 Q.B. 892.

[3] *Hale* v. *Metropolitan Saloon Omnibus Co.*, 28 L.J. Ch. 777; S.C. 4 Drewr. 492; *Darvill* v. *Terry*, 30 L.J. Ex. 355; S.C. 6 H. & N. 807.

[4] 4 Ch. 622, at p. 626.

the statute of Elizabeth." This *dictum* was adopted and followed in a later case, where B. executed a bill of sale to G. of all his property then existing, or afterwards to be acquired, in order to secure an existing debt and future advances.[1] In a similar case, J. granted his farming property, which was all he possessed, to his daughters, in consideration of their paying all his debts incurred up to that time in connection with working his farm, and maintaining him. The plaintiff, who was his creditor in respect of a transaction unconnected with the farm, sued to set it aside. Fry, J., in affirming the grant, said: "It is obvious that the intent of the statute is not to provide equal distribution of the estate of debtors among their creditors—there are other statutes which have that object,—nor is it the intention of the statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors. And cases have been cited, accordingly, where deeds of this kind have been held good, though the result of them has been that creditors have been not only delayed but excluded."[2]

§ 342. The mere fact that a transfer of property is for valuable or sufficient consideration, is not conclusive against its being fraudulent, though it throws a very heavy burden upon those who allege that it is so.[3] The question will still be, was it a *bonâ fide* transaction, which may be good though it has the effect of delaying or excluding creditors, or was it one which originated from an intention to defeat or hinder just claims? The intention which makes a deed fraudulent must have been the substantial, effectual, or dominating view. It is not necessary that it should have been the sole view.[4] The language of the judges in some cases seems to make it sufficient to show that the intention of the debtor in making the transfer was to defeat, hinder, or delay his creditors.[5] It must be remembered that no deed for a valuable consideration can be void under the statute of Elizabeth, unless it was intended to carry out some fraud, to which the purchaser made himself a party.

[1] *Re Bamford*, 12 Ch. D. 314.
[2] *Golden* v. *Gillam*, 20 Ch. D. 389, at p. 392.
[3] *Per* Lord Mansfield, *Cadogan* v. *Kennett*, Cowper, p. 434; *per* Turner, V.C., *Harman* v. *Richards*, 10 Hare, 89.
[4] *Re Bird*, 23 Ch. D. 695.
[5] *Holmes* v. *Penney*, 3 K. & J. 90; *per* Wood, V.C., p. 99; *Thompson*, v. *Webster*, 4 Drewr. 628; *per* Kindersley, V.C., p. 632; *Golden* v. *Gillam*, *per* Fry, J., 28 Ch. D., p. 393.

general the fraud consists in the whole transaction being unreal. Either it appears to be a sale or mortgage, when it is not, or if it is, as far as actual payment goes, a sale, it is accompanied by some secret trust, which undoes it. In a case of this sort, Baron Rolfe said: "In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest, and give him a security which left his other creditors unprovided for. But that is not the sense in which the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument, according to its apparent character and effect."[1] Suppose, however, that a debtor made arrangements to realize all his tangible property, in order to abscond with the proceeds and leave his creditors unpaid, and that a friend, knowing his plan, helped him in it by taking his property off his hands, even at a fair price, this would apparently make the sale void under the statute, and would no doubt be punishable under s. 206, if the object was to defeat justice in any of the ways specified in that section.

§ 343. **Indian decisions.**—The law, as administered in India, seems in accordance with these decisions. Under s. 276 of the Civil P.C., the debtor is free to make any private alienation of his property, until an actual attachment of the property has been made. It has also been repeatedly held that, "where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution."[2] And so, "if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference."[3] Such transactions, though made with a view to defeat a probable execution, are not void under ss. 23 and 24 of the Contract Act, IX. of 1872,

[1] *Eveleigh* v. *Purssford*, 2 M. & R. 541.
[2] *Sankarappa* v. *Romayya*, 3 Mad. H.C. 231; *Pullen Chetty* v. *Ramalinga*, 5 Mad. H.C. 368.
[3] *Suba Bibi* v. *Balyobind Das*, 8 All. 178.

as being forbidden by law, or fraudulent, or involving injury to the property of another, or opposed to public policy. They involve no dealing with a man's own property which the law does not allow.[1] "But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner, in lieu of the real owner (the debtor), and to make such nominal owner nothing more than trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor, and he would be entitled to attach and sell the property."[2] It would also undoubtedly be an offence punishable under s. 206.

In considering whether a transfer is genuine or fraudulent, evidence of various other transfers of property effected by the accused on the same day, and apparently with the same object, viz. that of preventing their being seized in execution of a decree, is admissible under ss. 14 and 15 of the Evidence Act, I. of 1872.[3]

§ 344. **Gifts.**—The law as regards gifts was laid down as follows by Lord Justice Giffard in *Freeman* v. *Pope*.[4] "If after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent to defraud, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them." Probably a judge in putting a case to the jury under s. 206 ought not to direct them, as a matter of law, that they must convict upon finding the above facts, but that such facts were very strong evidence upon

[1] *Rajan Harji* v. *Ardeshir*, 4 Bom. 70.

[2] *Tillakchand* v. *Jitamal*, 10 Bom. H.C. 206; *Joshua* v. *Alliance Bank of Simla*, 22 Cal. 185. See s. 53 of the Transfer of Property Act, IV. of 1882, as to the evidence of fraud.

[3] *Reg.* v. *Vajiram*, 16 Bom. 414.

[4] 5 Ch. 538, at p. 545, qualifying the too strong terms used by Lord Westbury, C., in *Spirett* v. *Willows*, 5 Giff. 49; S.C. 34 L.J. Ch. 365.

which they might convict, if there was nothing to explain them away. Debt is the normal condition of many classes of the native community, and with persons in high position the making of considerable gifts is a part of their ordinary expenditure. A man executed a bond in May, 1858, and about a year after the execution, and shortly before suit, he transferred to his wife 25,000 rupees as a gift; and the creditor after decree sued to set aside the gift, and to establish his right to take the securities in execution. The original court found that the gift was a *bonâ fide* disposition of the securities, and not a mere blind, or really with the intention of defrauding the plaintiff of the amount of his debt. The civil judge considered that the mere fact of the transfer, after the debt was incurred, and without provision for its payment, was itself a fraud on the plaintiff. The Madras High Court directed an issue as to the specific motives and intent of the debtor. They said: "In the case of a voluntary transfer, the *bona fides* of it with reference to the intention of the debtor is the point for consideration. In every such case, we think the proper question to be considered is, whether the circumstances in evidence, taken together, lead reasonably to the conclusion that the real motive and intention of the transaction was to deprive the creditor of the means of obtaining payment of his debt from the debtor's property generally. If so, the disposition is fraudulent and void to the extent of the debt due to the creditor by whom it is impeached. No general rule can be laid down as to the nature or extent of the evidence which should be acted upon. Being a question of intention, each case must necessarily be decided on the particular evidence offered in it, as to the acts of the parties and the position in which they stood to each other, the amount of the debt, the means possessed by the debtor, and the other circumstances shown to be connected with the transaction."[1] It seems to me that this would be the proper mode of directing a jury in a prosecution under s. 206, remembering always that more conclusive evidence is necessary to convict a man of a criminal offence based upon fraud, than to upset a transfer which defeats the claim of a creditor.

§ 345. In the Madras case it does not appear what amount of property remained to the debtor after the transfer. Possibly the creditor wished to invalidate the transfer, so as

[1] *Gnanabai* v. *Srinavasa Pillai*, 4 Mad. H.C. 84, at p.

to save himself the trouble of hunting for assets which were less valuable and less easily identified. In a case in Bombay the debtor, being in pecuniary difficulties, executed a gift of all his property in favour of his wife and minor sons. This, of course, left the debtor absolutely without assets, and the transaction was at once set aside.[1]

A voluntary conveyance by a man who is about to be tried for any crime, where conviction works a forfeiture, will be fraudulent. And even considerations of affection will not support the transfer, where the object is to remove the property from the effect of the sentence; as, for instance, where the conveyance by a man about to be tried for a felony was made in trust for a wife.[2] But such an assignment at any time before conviction will bind the property, if made *bonâ fide* and for valuable consideration.[3] Where, however, the assignment was made by a person who, under a mistake of fact, thought he had committed a crime when he really had not, it was held that the transaction was not illegal, and a re-conveyance to himself decreed.[4]

§ 346. **Fraudulent Preference.**—Under the Indian Insolvency Act, 11 & 12 Vict., c. 21, s. 24, any voluntary conveyance to the creditor by a person in insolvent circumstances, and in contemplation of becoming an insolvent, if made within two months before the petition on which an adjudication of insolvency takes place, shall be deemed fraudulent and void as against the assignees of the insolvent. Such a mode of avoiding what is called, in insolvency, a fraudulent preference, must be worked out in the Insolvent Court. It can have no bearing upon the question, whether the conveyance is void under the statute of Elizabeth. "No consequence whatever can follow from an act of bankruptcy, of which the creditors might have availed themselves if they had applied in time, but of which they did not avail themselves within the time limited by the Bankruptcy Act."[5] Accordingly, where A being indebted to B and C, after being sued to judgment by B, went to C, and voluntarily gave him a warrant of attorney to confess judgment, on which judgment was immediately entered, and execution

[1] *Hormusji* v. *Cowasji*, 13 Bom. 297.
[2] *Re Saunders'* estate, 32 L.J. Ch. 224; S.C. 4 Giff. 179.
[3] *Whitaker* v. *Wisbey*, 12 C.B. 44; *Chowne* v. *Baylis*, 31 L.J. Ch. 757; S.C. 31 Beav. 351.
[4] *Davies* v. *Otty*, 34 L.J. Ch. 252.
[5] *Per* Thesiger, L.J., *re Bamford*, 12 Ch. D., at p. 324.

levied on the same day on which B would have been entitled to execution, and had threatened to sue it out, it was held that the preference given by A to C was not unlawful. Lord Kenyon, C.J., said: "There was no fraud in this case. The plaintiff (C) was preferred by his debtor (A), not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice."[1] No provision avoiding conveyances by way of fraudulent preference is found in the insolvency clauses of the Civil P.C., Chapter XX., but under s. 351, such an unfair preference for one creditor may be made a ground for refusing the debtor his discharge. Where the widow of a man who died insolvent conveyed his whole property to his separated brothers in consideration of two time-barred debts, it was held that this transfer could not be set up as against an attachment, made after the death of the husband under a decree obtained against him while still alive. West, J., seems to have rested the case on the ground of fraudulent preference; and the disfavour with which the jurisprudence of civilized nations regards unequal dispositions of property by a man in insolvent circumstances, and known to be such by the disponee, which leads to their being set aside, unless where the transferee has simply pressed a valid claim, or made a purchase in good faith.[2] In the particular case the conveyance was a purely voluntary gift, and probably a sham. If the impropriety of the transaction consisted in preferring one creditor to all the others, then the Court did exactly the same thing in favour of the plaintiff. As Sergent, C.J., pointed out in *Motilal* v. *Utam Jagivandas*,[3] the proper remedy in such a case is to take some proceeding, which apparently ought to be by s. 344 of the Civ. P.C., to have the whole property dealt with for the benefit of all the creditors. This is exactly what was said by Fry, J., in *Golden* v. *Gillam*, and by Thesiger, L.J., in *re Bamford* (*ante*, §§ 341, 346). In a case where a very large debt was due to the defendants, who were some of many creditors, and the debtor assigned to them a decree, out of which they were to pay themselves, and hand over the balance to the debtor's father, and where the defendants accepted and carried out the arrangement in good faith, the Madras High

[1] *Holbird* v. *Anderson*, 5 T.R. 235.
[2] *Rangilbai* v. *Vinayek Vishnu*, 11 Bom. 666, at p. 676.
[3] 13 Bom. 434.

Court held that it could not be set aside at the suit of another creditor.[1] The Court spoke of the debtor as having acted fraudulently in contemplation of his approaching failure and insolvency. But the term *fraudulently* in this application means nothing more than that the arrangement was opposed to the equal distribution prescribed by the insolvency laws, when they are put into operation.[2] Here they had not been put into operation, and, till they are, a man is master of his own money, and may pay any creditor he wishes, in any order he wishes, provided he really does pay him, and does not only pretend to pay him. Apparently, then, no payment by way of preference by a man in difficulties would be punishable under s. 206, merely because the insolvency law calls it a fraudulent preference.

§ 347. Chapter XVII. contains another set of sections—421 to 424—the object of which appears to be so similar to that of ss. 206 to 208, that it is difficult to understand why they are found in a different part of the Code. In order to satisfy s. 206, a definite intention must be found to prevent the property dealt with from being seized under an impending decree, or execution of a court of justice. Under s. 421, the intention must be to prevent property from being distributed according to law amongst creditors. Under s. 422 there must be an intent to prevent a debt or demand from being made available according to law for the payment of debts. No specific intent is stated in ss. 423 and 424. It is sufficient to make out that the acts done were dishonestly or fraudulently done. Taken together, the two series of sections seem intended to punish every conceivable mode in which a man can deal with his own property, for the purpose of cheating somebody else.

§ 348. **Fraud on Insolvency Law.**—The intention which governs the whole of s. 421 is "to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors, or the creditors of any other person." This can only refer to proceedings in the nature of insolvency, either under the Presidency Act, or under the insolvency clauses of the Civil Procedure Code already referred to (*ante*, § 346). There is no other process known to the law by which a man's property is distributed among his creditors. Section 206 plainly

[1] *Gopal* v. *Bank of Madras*, 16 Mad. 379.
[2] Lord Hobhouse, 15 I.A., p. 19.

refers to the ordinary process, by which each creditor seizes on his own account whatever he can get. It is not necessary, under s. 421, that the defendant should have actually come under the operation of the insolvent law, or that steps should have been taken, or even be about to be taken, to bring him under the operation of the law. It is necessary that the act should be done in contemplation of insolvency; that is to say, that at the time the act complained of is done, or in consequence of that act after it is done, he should be made unable to pay his creditors in the ordinary way.[1] Further, it must be done with the intention of preventing the equal distribution of the debtor's property among his creditors, and in a manner which can be described as dishonest or fraudulent.

§ 349. **Fraudulent Preference.**—Where an insolvent debtor removes, or conceals, or delivers over his property to any person, simply in order that it may escape seizure for his debts, there can be no doubt as to both the dishonesty and fraud of the proceeding. The only difficulty will arise under the next clause of the section, where he dishonestly or fraudulently transfers or causes to be transferred to any person without adequate consideration, any property, with the intent described in the section. This seems to aim at what is known in bankruptcy as fraudulent preference. The use of the words "dishonestly or fraudulently," shows that the section contemplates different states of mind, of which, probably, fraudulent is the weaker, and is used because it is a technical term, which has been frequently defined by the courts in reference to this particular class of acts. In *Young* v. *Fletcher*,[2] Pigott, B., said, with regard to s. 67 of 12 & 13 Vict., c. 106, which declares that a fraudulent transfer by a trader of any of his goods with intent to defeat or delay his creditors, shall be an act of bankruptcy: "We have to say what is the meaning of the word 'fraudulent' in the section. It seems to me that all the authorities almost are uniform upon that subject, and it is not necessary that there shall be moral fraud. The great point to look at is this: Would it have the effect of defeating and delaying the creditors? and if so, it is fraudulent within the meaning of the bankruptcy acts, the object of which is that

[1] *Smith* v. *Cannan*, 2 E. & B. 35; S.C. 22 L.J. Q.B. 290; *Morris* v. *Morris* (1895), A.C. 625.

[2] 3 H. & C. 732; S.C. 34 L.J. Ex. 154.

the goods of the debtor shall be divided ratably among his creditors." As to what acts are considered to have such an effect, the law was laid down as follows by Wightman, J.:[1] "The assignment of the whole of a trader's property is an act of bankruptcy, as the necessary effect of such a deed is to delay and defeat creditors. So also the assignment of the whole, with a colourable exception only of part, is an act of bankruptcy for the like reason, for though a small part is left out, it is in effect an assignment of the whole. An assignment of part by way of fraudulent preference would be an act of bankruptcy; but if it be assigned under pressure, the authorities show that it is not an act of bankruptcy." It is not a necessary ingredient in the fraud which constitutes an act of bankruptcy that the grantee should have notice of the fraud.[2]

§ 350. An assignment even of the whole of a trader's property, present and future, is not fraudulent under the bankruptcy law, if at the time of the assignment he receives some substantial contemporaneous payment *in futuro*; for such an arrangement, so far from defeating or delaying his creditors, may enable him to continue his business so as to put them in a better position.[3] Nor is the mere fact that a debtor under insolvent circumstances pays the whole of his claim to a single creditor either an act of bankruptcy or an indictable offence. It is a preference, but it is not a fraudulent preference, unless the act is done by the debtor of his own accord, for the purpose of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest.[4] Hence the transaction is not fraudulent, where it is a *bonâ fide* act on the part of the debtor, resulting from the pressure for payment of a genuine creditor,[5] or is the consequence, after the debtor has become insolvent, of an agreement to give security entered into before the affairs had become desperate.[6] And so it was held in a case where the debt had been incurred

[1] *Smith* v. *Timmins*, 1 H. & C. 849; S.C. 32 L.J. Ex. 215.
[2] *Hall* v. *Wallace*, 7 M. & W. 353; *Smith* v. *Cannan*, 2 E. & B. 35; S.C. 22 L.J. Q.B. 290.
[3] *Khoo Kwat Siew* v. *Wooi Taik*, 15 I.A. 15, p. 19.
[4] *Per* Cockburn, C.J., *Bills* v. *Smith*, 34 L.J. Q.B. 68, at p. 72; *per* Lord Romilly, *Johnson* v. *Fesenmeyer*, 25 Beav., p. 93, affd. 3 De. G. & J. 13; followed, *Smith* v. *Pilgrim*, 2 Ch. D., p. 134.
[5] *Brown* v. *Kempton*, 19 L.J. C.P. 169.
[6] *Ex p. Tempest*, 6 Ch., p. 73, *per* Lord Justice James; *re Tweedale* (1892), 2 Q.B. 216.

through a criminal breach of trust, and the payment was made under a threat of exposure and persecution. The preference was undoubtedly made for the benefit of the debtor, but it was made under coercion, and with no wish to give a personal preference to the creditor.[1]

§ 351. In the majority of cases of so-called fraudulent preference there is a complete consideration for the act, as the payment discharges a debt which is legally binding. Where the transfer is, in the language of the section, "without adequate consideration," the mere inadequacy of the consideration, though tending to evidence fraud, is not conclusive of it. A man who is known to be in difficulties can seldom dispose of his property for its full value. An important question, however, arises upon these words, whether inadequacy of consideration for the transfer is not an essential element in the offence created by the section, so that it would be necessary to prove that a transfer was (1) fraudulent, (2) without adequate consideration, and (3) with the intention to prevent a ratable distribution among creditors. If so, the act which is punishable under s. 421 will be something much beyond what is required to make out a fraudulent preference under the Insolvent Act.

§ 352. The remaining sections refer to frauds unconnected with insolvency, or the proceedings under it. Section 422 relates to fraudulent proceedings to prevent the attachment and sale under s. 266 of the Civil P.C. of debts due to the accused himself, or to any other person. Section 423 punishes the fraudulent insertion of false statements in deeds affecting property.

Two ingredients are required to make up the offence in the latter section. First, a fraudulent intention, and, secondly, a false statement as to the consideration for the document or the person in whose favour it is to operate. The mere fact that an assignment has been taken in the name of the person not really interested will not be sufficient. Such transactions, known in Bengal as *benamee* transactions, have nothing necessarily fraudulent. But if a debtor were to purchase an estate in the name of another for the purpose of shielding it from his creditors; or to execute a mortgage deed, reciting a fictitious loan; or if the manager of a Hindu family, assigning the family property without any necessity, were to insert in the deed a statement that the

[1] *Ex p. Taylor*, 19 Q.B.D. 295.

assignment was made to pay the Government dues, or to discharge an ancestral debt, this would be such a fraudulent falsehood as would bring his act within s. 423.

Section 424 appears to render punishable the same acts which were dealt with in the first clause of s. 421 and in s. 423, whatever the motive for doing them was, provided it was a fraudulent motive.

Such acts as the removal by a tenant of his furniture, or crops, to avoid a distress for rent, or a release of a debt by one of several executors, partners, or joint-creditors, to the injury of the others, and without their consent, would come within this section. And so it has been held that one partner may be convicted under this section for dishonestly removing the partnership account books, in fraud of his co-partners.[1] But care must be taken that purely civil rights are not disposed of under this section in criminal courts.[2]

§ 353. **False Information.**—Sections 182 and 211 are placed in different chapters of the Penal Code, but are so similar that they may advantageously be considered together. The offence under s. 182 consists in knowingly giving a public servant false information, with the intention of inducing the public servant either to use his lawful power to the injury or annoyance of any person, or to do or omit anything which he would not have done or omitted, if he had known the true state of facts. The offence under s. 211 is what is known in England as a false and malicious prosecution. It is obvious that every offence under s. 211 could be made to fit into the terms of s. 182, and that many, but not all, offences under s. 182 would also be offences under s. 211.

§ 354. Where the charge is based on the second clause of s. 182, the essence of the offence consists in the intention of inducing the public servant to cause injury or annoyance to some other person. It is not an offence under s. 182 to give false information to a Collector that a Zemindar had usurped Government land, as the only result would be, that, if the Collector agreed with the informant, he would take due and lawful steps to assert the rights of Government.[3] The Madras High Court has held that false information given to a village magistrate, who could not himself act upon it, but could only pass it on to some higher authority, did not

[1] *Reg.* v. *Gour Benode*, 13 B.L.R. 308, n. 2; S.C. 21 Suth. Cr. 10.
[2] Mad. H.C. Pro., 15th August, 1868; S.C. Weir, 113 [189]; *Reg.* v. *Brojo Kishore*, 8 Suth. Cr. 17.
[3] *Empress* v. *Madho*, 4 All. 498.

come within the words of this section. They thought that "the words 'to use his lawful power' referred to some power to be exercised by the officer misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is levelled."[1] But, conceding this to be so, surely information given to A, for the purpose of being passed on to B, and which it was his bounden duty so to pass on, must be considered as having been given, and intended to be given, to B.[2] It would, of course, be different if the false information was given to some one who was under no legal obligation to take any action upon it.[3] False information that stolen property would be found in a particular house, if searched for, does come within the section. If the information names the houses of several persons, only one offence has been committed. The offence consists in the false information, with a particular intent. The offence is not multiplied by the number of persons likely to suffer from it.[4]

§ 355. The Calcutta High Court held, in one case, that the same intention must exist where the charge was under the first clause; consequently, that the section would not apply where a person gave false information to the police of a robbery, without naming any one against whom they could act.[5] It is obvious, however, that this is taking the words "to the injury or annoyance of any person" out of their proper grammatical connection. Accordingly, the Bombay High Court has declined to follow this ruling, and holds that the mere fact of giving a public servant false information in order to induce him to take, or omit, a particular line of action, is itself criminal, though no individual is hurt. The mere taking up the time of a public servant by a hoax ought to be punishable. Such a proceeding might have very grave public consequences, if the police or the troops were sent off on a false alarm, given from criminal motives, or even from mere wantonness.[6] The same view was taken by the High Court of Allahabad, in a case where the offence consisted in a telegram sent to the

[1] *Reg.* v. *Periannen*, 4 Mad. 241.
[2] See *Kendillon* v. *Maltby*, 1 Car. & M. 493; *Karim Buksh* v. *Reg.*, 17 Cal. 574.
[3] *Reg.* v. *Jamoona*, 6 Cal. 620, *post*, § 358.
[4] *Poonit Singh* v. *Madho Bhot*, 13 Cal. 270.
[5] *Re Golam Amed Kazi*, 14 Cal. 314.

magistrate during the Mohurrum, giving him false information of a riot in another part of his district.[1] In the Bombay case, a candidate for office had got a more learned friend to pass an examination in his name, and then forwarded the certificate granted to his proxy to the assistant Collector, who entered his name as a person eligible for appointment. This was held to be an offence under s. 182. In a somewhat similar case, the defendant applied for enlistment in the police of the Farukhabad district, and knowing that the rules prohibited the enlistment of a resident in the district, falsely stated that he was not a resident. The Allahabad High Court held that this was not an offence under either s. 177 or s. 182.[2] It certainly did not come under s. 177, as he was not legally bound to make any statement on the subject; but since the false statement was a necessary step towards inducing the police authority to do what the defendant wanted to have done, I cannot see why it did not come within s. 182.

It is not necessary under either clause to show that any action has in fact been taken by the public servant. The offence consists in the attempt to induce him to act.[3]

§ 356. The punishment that may be awarded under s. 182 is much lighter than that under s. 211, and the jurisdiction over the offences is in some degree different. It is therefore not right to prosecute under s. 182 where the facts come more properly under s. 211. When the false information consists of a specific charge of a criminal offence against persons who are named, the proceedings should be taken under s. 211.[4] Statements made by a prisoner in his defence do not come within this section.[5]

When the false information has been given with the intention of injuring or annoying any private person, who is in fact injured or annoyed in consequence, he may prosecute for the offence, subject to obtaining sanction necessary under s. 195 of the Crim. P.C.[6]

[1] *Reg.* v. *Budh Sen*, 13 All. 351.
[2] *Reg.* v. *Dwarka Prasad*, 6 All. 97.
[3] *Reg.* v. *Budh Sen*, 13 All. 351; *Reg.* v. *Raghu Tiwari*, 15 All. 336.
[4] *Raffee Mahomed* v. *Abbas Khan*, 8 Suth. Cr. 67; *Bhokteram* v. *Heera Kolita*, 5 Cal. 184; *Reg.* v. *Radha Kishen*, 5 All. 36, affd. on this point, *Reg.* v. *Jugal Kishore*, 8 All. 382.
[5] *Reg.* v. *Darin*, 2 N.W.P. 128.
[6] *Reg.* v. *Jugal Kishore*, 8 All. 382, overruling in this respect, *Reg.* v. *Radha Kishen*, 5 All. 36; *Bhokteram* v. *Heera Kolita*, 5 Cal. 184; *Poonit Singh* v. *Madho Bhot*, 13 Cal. 270. As to the sanction, when required, see *post*, § 711.

A head-constable is a public servant within the meaning of this section.[1] So is a vaccinator.[2]

§ 357. **False Charge.**—Section 211 contemplates two different offences—a false charge and the institution of criminal proceedings. The latter necessarily assumes the former, but the former may be committed where no criminal proceedings follow. "To constitute the offence of preferring a false charge contemplated in s. 211 of the Penal Code, it is not necessary that that charge should be before a magistrate. It is enough if it appear, as it does in the present case, that the charge was deliberately made before an officer of police with a view to its being brought before a magistrate. Of course a mere random conversation or remark would not amount to a charge." In the case in which these observations were made, the charge had been preferred before an inspector of police, who disbelieved it, and refused to act upon it.[3] This offence has been held to be only punishable under the first head of s. 211, even though the false charge relates to any offence punishable with death, transportation for life, or imprisonment for seven years or upwards.[4] On the same principle it has been held that a prisoner may be charged under two heads for bringing a false charge, and for instituting criminal proceedings, the offences being different.[5] A contrary decision was given by a Full Bench of the High Court of Calcutta, in a case where the defendant had made to the police a charge of setting fire to his house, which upon a local inquiry was held to be false. If true, it would have been punishable under s. 436 with transportation for life. The defendant was charged under the first head of s. 211, and sentenced to three years' imprisonment. The conviction was affirmed by the High Court.[6] The referring order relied upon one case,[7] in which a false charge of dacoity made to the police had been held legally punishable with three years' imprisonment;

[1] *Reg.* v. *Ram Golam*, 11 Suth. Cr. 33; *Reg.* v. *Grish Chander*, 19 Suth. Cr. 33.

[2] 6 Mad. H.C. Rulings 48.

[3] *Per* Scotland, C.J., *Reg.* v. *Subbana*, 1 Mad. H.C. 30, folld. 4 Suth. Cr. Letters 11; *Reg.* v. *Abul Hasan*, 1 All. 497; *Ashrof Ali* v. *Reg.*, 5 Cal. 281.

[4] *Reg.* v. *Pitam Rai*, 5 All. 215; *Reg.* v. *Parahu*, *ibid.* 598; *Reg.* v. *Karim Buksh*, 14 Cal. 633.

[5] *Reg.* v. *Nobokisto Ghose*, 8 Suth. Cr. 87.

[6] *Karim Buksh* v. *Reg.*, 17 Cal. 574.

[7] *Reg.* v. *Nathoo Doss*, 3 Suth. Cr. 12.

to a second, in which the Court said that "to prefer a complaint to the police in respect of an offence which they were competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the s. 211.[1] In this case it does not appear what the charge was, or what the question was which came before the court. Lastly, to two other cases, in which it appears to have been held that a mere false complaint to the police of a crime coming within the second head of s. 211, was an institution of a criminal proceeding, which made the offence triable only by a sessions judge.[2] The Full Bench decision admitted that a false charge, and the institution of criminal proceedings, must be taken to mean two different things, though not things mutually exclusive. They considered that a man who made a false charge to the police of a cognizable offence did institute criminal proceedings within the meaning of s. 211, but not when the charge was of a non-cognizable offence.[3] The ground of the distinction was, that in the former case, the proper officer of police may proceed to make an investigation; and if the result of that investigation is adverse to the accused, he is in due course brought by the police before a magistrate. In the latter case the police cannot take any step of their own authority. Everything that is done must proceed from the direct action of the complainant himself. It is, of course, quite clear that if a person lays a charge before the police, who take up the matter in a way which results in criminal proceedings being taken before a magistrate, those proceedings are instituted by the complainant, inasmuch as he has set the police in motion in a manner which must have that result, if his charge is believed. The same conclusion, however, does not appear to follow if his charge is discredited. In that case the outside which takes place is a mere local inquiry, of which the person falsely charged may never hear, and which can cause him neither injury nor annoyance. No criminal proceeding is ever taken against him. It is a very grave offence to bring a false charge which may result in the institution of criminal proceedings; but the injury to the person charged is very different if the charge matures into a criminal proceeding, with all its annoyance,

[1] *Reg.* v. *Bonomally Sohai*, 5 Suth. Cr. 32.
[2] *Raffee Mahomed* v. *Abbas Khan*, 8 Suth. Cr. 67; *re Kader Buksh*, 21 Suth. Cr. 34.
[3] See Crim. P.C., s. 4 (*q*).

grounds.[1] On the other hand, the prosecution may make out a case sufficient to establish the guilt of the prisoner, if not rebutted, and which therefore makes it necessary for him to adduce evidence in reply.

The knowledge that the charge was a false one must, of course, be inferred from the circumstances of each case, but this must be judged of according to the facts as they were known, or supposed to be when the charge was made, not as they are ascertained by more complete inquiry. And, accordingly, the party accused of making a false charge will always be allowed to show the information on which he acted, and the rumours, or even suspicions, which were afloat against the person accused. Not, of course, for the purpose of establishing the guilt of the latter, but of showing the *bona fides* of his own conduct.[2] The prosecution must establish that there was no just or lawful ground for the proceedings, and that the defendant had not taken reasonable care to inform himself of the true facts. Any evidence which shows that he believed, and had reasonable grounds for believing, the charge made by him will be admissible in his behalf.[3] "Belief is essential to the existence of reasonable and probable cause. I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense. Proof of the absence of belief is almost always involved in the proof of malice."[4]

Rashness in making a charge, which is in fact believed, is not of itself indictable.[5] But where there is a ready and obvious mode of ascertaining the truth of the charge—as, for instance, by personal inquiry from the person on whose information the accuser acts, and the opportunity of so doing is neglected by the defendant, the absence of inquiry is an element in determining the question of the presence, or absence, of probable cause. What its weight may be must depend on the circumstances of each case. Therefore, where the defendant gave A into custody on a charge of felony, acting on information received from B, which was

[1] *Reg.* v. *Nobokisto Ghose*, 8 Suth. Cr., at p. 89; *per* P.C., *Baboo Gunnesh Dutt* v. *Mugneeram*, 11 B.L.R., pp. 329, 330.
[2] *Reg.* v. *Navalmal*, 3 Bom. H.C. C.C. 16.
[3] *Abrath* v. *N. E. Ry. Co.*, 11 App. Ca. 247, affg. 11 Q.B.D. 440.
[4] *Per* Lord Denman, C.J., *Haddrick* v. *Heslop*, 12 Q.B. 267, at p. 274.
[5] *Reg.* v. *Pran Kissen*, 6 Suth. Cr. 15.

itself derived from C, and he made no inquiry himself from C, and the judge directed the jury that on that state of circumstances there was no reasonable and probable cause, the Court of Exchequer Chamber refused to disturb the verdict on the ground of misdirection.[1] But the House of Lords ordered a new trial, being of opinion that the necessity for inquiry from C would depend upon the position and circumstances of the informant B, and was not in itself conclusive and necessary evidence of want of reasonable and probable cause.[2]

§ 360. The intent to cause injury, or that malice which is necessary to support a suit for a malicious prosecution, cannot be inferred from the mere fact, that a charge has been brought which turns out to be unfounded, or brought without probable cause.[3] Nor does it require proof of personal hostility to the person charged. As Parke, J., said: "Malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives."[4] As, for instance, where the defendant had brought a charge of perjury against the plaintiff, because it would stop the plaintiff's mouth in a proceeding in which he would be likely to give evidence against the defendant.[5] But the baselessness of the charge, and the motive with which it is brought, mutually act upon each as a matter of evidence. Mere spite does not prove that the charge is unfounded. A man may bring a perfectly true charge from the worst of motives, without committing a crime.[6] Nor does the fact that a charge has been dismissed, or that it has been abandoned, prove that it was brought maliciously or without reasonable and probable cause.[7] If, however, a man brings a charge which is false, on grounds which no reasonable man would believe, it goes a long way towards showing that he did not believe it, and that he acted with the sole intention of injuring the person charged. And conversely, if a man who brings an

[1] *Perryman* v. *Lister*, L.R., 3 Ex. 197.
[2] L.R. 4 H.L. 521.
[3] *Hall* v. *Venkata Krishna*, 13 Mad. 394.
[4] *Mitchell* v. *Jenkins*, 5 B. & Ad., p. 595.
[5] *Haddrick* v. *Heslop*, 12 Q.B. 267.
[6] *Reg.* v. *Chidda*, 3 N.W.P. 327; *Raj Chunder Roy* v. *Shama Soonari*, 4 Cal. 583; *Reg.* v. *Amarsing*, 10 Bom. 506; *Bradford* v. *Pickles*. [1894], 3 Ch., at p. 68.
[7] *Willans* v. *Taylor*, 6 Bingh. 183; *per* P.C. 11 B.L.R., p. 330.

unreasonable charge, is shown to be acting from motives, this leads to a very strong inference that he not believe that his accusation was true.[1]

§ 361. Where a case of this sort is tried by a judge and jury, it is the duty of the judge to direct the jury, as a matter of law, whether the facts alleged on behalf of the defence amount to reasonable and probable cause; and it is the province of the jury to find, as a matter of fact, whether the facts so alleged actually exist.[2]

§ 362. In an action for a malicious prosecution, it is necessary to show that the case terminated in favour of the complainant.[3] The object of the rule is to prevent a conflict of decisions between a civil and a criminal tribunal, and also because it would be impossible in most cases to find that a charge was not only false, but made without reasonable and probable cause, which had been found to be true by the tribunal before which it had been preferred. Even where a conviction upon the original charge had been subsequently reversed, the Madras High Court held that, in the absence of very special circumstances, the judgment of one competent tribunal against the plaintiff afforded very strong evidence of reasonable and probable cause.[4] It is obvious, however, that although a conviction unreversed would be strong evidence that the charge was properly made, it might be shown that the conviction was itself procured by means of a conspiracy to bring forward false evidence in support of a false charge. In one of the earliest cases under this section, Scotland, C.J., said: "It is said that it must appear that the charge was fully heard and dismissed. This is not necessary. It is enough in a case like the present, if it appear that the charge is not still pending. An indictment for falsely charging could not be sustained if the accusation were entertained, and still remained under proper legal inquiry. Here the facts that the inspector of police refused to act upon the charges, and that no further step was taken, are enough to bring the case within s. 211."[5] Accordingly, where a charge of theft was

[1] See *per* Lord Mansfield, C.J., *Johnstone* v. *Sutton*, 1 T.R., p. 545.

[2] *Willans* v. *Taylor*, 6 Bing., pp. 186, 188; *Howard* v. *Clarke*, 20 Q.B.D. 558.

[3] *Basébé* v. *Matthews*, L.R. 2 C.P. 684; *Venu* v. *Coorya*, 6 Bom. 376.

[4] *Parimi Bapirazu* v. *Bellamkonda Venkayya*, 3 Mad. H.C. 238, following *Reynolds* v. *Kennedy*, 1 Wilson, 232.

[5] *Reg.* v. *Subbana*, 1 Mad. H.C. 30; *Ashrof Ali* v. *Reg.*, 5 Cal. 281; *Reg.* v. *Salik Roy*, 6 Cal. 582.

reported as false by the police, upon which the complainant was prosecuted under s. 211, and he then appeared in court and formally renewed his complaint, which remained still pending, a conviction under s. 211 was set aside.[1] Where, however, the magistrate acting under Crim. P.C., X. of 1872, s. 147, which corresponds to Crim. P.C., X. of 1882, s. 203, examined the complainant, and agreeing with the report of the police, dismissed the complaint without hearing evidence, it was held that a subsequent prosecution under s. 211 was not illegal.[2] The fact that the complainant did not proceed with the charge, because he had compounded it with the accused under s. 345 of the Crim. P.C., is no defence to an indictment under s. 211.[3]

§ 363. The same principles have been followed in the comparatively rare cases in which an indictment under s. 182 has been preferred, in respect of a false charge of a triable offence. In two cases where the police had refused to proceed upon the charge, considering it to be false, but the complainant had persisted before the magistrate in asserting its truth, it was held that a conviction was illegal, where the magistrate had refused to deal with the original charge.[4] An opposite decision was given in a later case, which seems hardly distinguishable from the two just cited.[5] The charge which the prosecutor actually intended to bring, and not that which was framed by the magistrate upon his evidence, must form the basis of a prosecution under s. 211. If he alleges an assault and theft, he cannot be indicted for making a false charge of dacoity.[6] But where the facts stated by the prosecutor amount to a particular offence, and no other, and that statement is maliciously false, I do not see how his ignorance of the legal aspect of those facts can alter the character of his crime. No sanction is required under the Crim. P.C., s. 195, where the false charge is only made to the police.[7] As to the sanction in other cases, see *post*, § 714.

[1] *In re Bishoo Barik*, 16 Suth. Cr. 77; *Government* v. *Karimdad*, 6 Cal. 496; *Reg.* v. *Sham Lall*, 14 Cal. 707.
[2] *Reg.* v. *Bhawani Prosad*, 4 All. 182; *Ramasami* v. *Reg.*, 7 Mad. 292.
[3] *Reg.* v. *Atar Ali*, 11 Cal. 79.
[4] *Reg.* v. *Radha Kishen*, 5 All. 36; *Reg.* v. *Jamni*, 3 All. 387.
[5] *Reg.* v. *Rhaghu Tiwari*, 15 All. 336.
[6] *Reg.* v. *Melon Meeah*, 3 Wym. Cr. 9.
Ramasami v. *Reg.*, 7 Mad. 292.

CHAPTER VIII.

ACTS AFFECTING THE PUBLIC HEALTH AND SAFETY.

I. Nuisance, §§ 364—376.
II. Negligence, §§ 377—394.

§ 364. **Public Nuisance.**—A person is guilty of a public nuisance who does an act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance, to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance, to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage (s. 268).

Nuisances are either public or private. The appropriate remedy for a public nuisance is by way of proceeding under criminal law; for a private nuisance, is by action or injunction. An indictment will fail if the nuisance complained of only affects one or a few individuals; where upon an indictment against a tinman for the noise made in carrying on his trade, it appeared in evidence that the noise only affected the inhabitants of three sets of chambers in Clifford's Inn, and that, by shutting the windows, the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C.J., that the indictment could not be sustained, as the annoyance was, if anything, a private nuisance.[1] Similarly, an action will fail if the plaintiff complains of something which is a public nuisance, which causes him no special and particular damage beyond that which results from it to the community in general; for, otherwise, the offending party might be ruined by a million of suits.[2]

[1] *R.* v. *Lloyd*, 4 Esp. 200.

[2] *Winterbottom* v. *Lord Derby*, L.R. 2 Ex. 316; *Ramphul Rai* v. *Raghanandum*, 10 All. 498; *Satku Valid Kadir* v. *Ibrahim Aga*, 2 Bom. 457.

§ 365. In general, it may be laid down that anything which seriously affects the health, safety, comfort, or convenience of the community may be indicted as a public nuisance. For instance, drawing water for a canal from a filthy and polluted source;[1] carrying on trades which caused offensive smells[2] or intolerable noises;[3] keeping gunpowder, naphtha, or similar inflammable substances in such large quantities as to be dangerous to life and property.[4] And so every act will be a nuisance which obstructs the public in the use of a highway or navigable river, either by actually blocking up or narrowing the available passage,[5] or by causing such a noxious smell as to be a substantial annoyance to those using the highway, although not to the neighbourhood in general,[6] or by placing anything on the land next to the highway, which can be a source of danger to persons properly using it.[7] So it has been held, that where a man uses his premises in a perfectly innocent manner, as by giving entertainments with music and fireworks, if the result is to bring together crowds of disorderly persons, and this is repeated so often as to be a serious annoyance to the neighbourhood, it is indictable as a nuisance.[8] Acts which merely cause a partial or temporary inconvenience, such as the omission to prevent ponies or buffaloes straying on the highway, are not indictable as public nuisances under s. 294.[9]

§ 366. Under English law the keeping of a brothel or a gambling-house is indictable as a nuisance, chiefly, as it would appear, from the injury thereby caused to public morals.[10] I doubt, however, whether such an injury comes within any of the terms of s. 268. Where a person kept a common gambling-house, which brought together crowds

[1] *Atty.-Gen.* v. *Bradford Canal*, L.R. 2 Eq. 71.
[2] *Malton Board of Health* v. *Malton Manure Co.*, 4 Ex. D. 302; *Rapier* v. *London Tramways Co.* (1893), 2 Ch. 588.
[3] *Lambton* v. *Mellish* (1894), 3 Ch. 163.
[4] *Reg.* v. *Lister*, D. & B. 209; S.C. 26 L.J. M.C. 196; *Hepburn* v. *Lordan*, 2 Hem. & M. 345; S.C. 34 L.J. Ch. 293.
[5] *Benjamin* v. *Storr*, L.R. 9 C.P. 400; *R.* v. *Lord Grosvenor*, 2 Stark. 511; *Petition of Umesh Chandra*, 14 Cal. 656.
[6] *R.* v. *Pappineau*, 2 Stra. 686; *R.* v. *Neil*, 2 C. & P. 485.
[7] *Penna* v. *Clare* (1895), 1 Q.B. 199.
[8] 1 Hawk. P.C. 693; *R.* v. *Moore*, 3 B. & Ad. 184; *Walker* v. *Brewster*, L.R. 5 Eq. 25.
[9] *Joyanath* v. *Jamul*, 6 Suth. Cr. 71; *Onooram* v. *Lamessor*, 9 Suth. Cr. 70.
[10] 1 Hawk. P.C. 693; 5 Bac. Abr. 788, Nuisance A.

of disorderly persons to the general annoyance of the neighbourhood, the keeper of the house was properly convicted under s. 290 of a nuisance.[1] In another case from Madras, persons who on a public road induced villagers to play at cards, and who won money from them, were held also punishable under the same section as being guilty of a nuisance.[2] Gambling in a public thoroughfare or place is punishable under the Towns Police Act, XIII. of 1856, s. 66, which is still in force in Bombay, and under the Calcutta Police Act, IV. of 1866 (Bengal), s. 52, and under the Town Nuisances Act, III. of 1889 (Madras), but I am not aware of any other authority for holding that it is an offence under the Penal Code. It has been held both in Madras and Bombay, that gambling in a private house is not *per se* punishable as a public nuisance, and I do not suppose it would make any difference to show that the gambling was habitual. In the Bombay case the Court suggested, on the strength of the English decisions, that they "might perhaps hold that a common gambling-house, to which every one who chooses to pay is able to go, is necessarily a nuisance, and that no evidence of any actual annoyance to the public is in such a case required."[3] In the particular case no such facts were made out, and I doubt whether the Court on solemn argument would carry out their own suggestion. It is an offence under various Police Acts to keep or to resort to a common gambling-house.[4]

§ 367. The fact that a prostitute visited a dâk bungalow, after being warned by the person in charge not to do so, is not indictable as a public nuisance under s. 290, when she was not shown to have annoyed any one, or committed any impropriety, beyond what was involved in her attending upon a traveller at his request.[5] If prostitutes settled themselves in numbers in a particular street or quarter of a town, exhibiting themselves in an indecent manner, and annoying the persons passing by with their solicitations, this would probably be held to be a public nuisance. But

[1] *Reg.* v. *Thandavarayudu*, 14 Mad. 364.

[2] Mad. H.C. Pro., 28 Jan., 1878; S.C. Weir, 73 [100].

[3] Mad. H.C. Pro. 25 Feb., 1879; S.C. Weir, 74 [100]; *Subbaraya* v. *Devandra*, 7 Mad. 301; *Reg.* v. *Hau Nagji*, 7 Bom. H.C. C.C. 74.

[4] Act XIII. of 1856, ss. 57, 87; Bengal Acts, II. of 1866, ss. 25, 26, and IV. of 1866, ss. 44, 45; Madras Act, VIII. of 1867, ss. 31, 32. See also, as to cheating at cards, Act XIII. of 1856, s. 64; Madras Act, VIII. of 1867, s. 39.

[5] *Reg.* v. *Mt. Begum*, 2 N.W.P. 349.

the existence of one or more brothels, simply occupied by prostitutes, and resorted to by those who desired them, though very offensive to the immediate neighbours, would hardly, I think, come within the definition of s. 268, as being an "annoyance to the public in general who dwell or occupy property in the vicinity." Where a magistrate had ordered the removal of a house which a prostitute had built on her own land, and in which she was living, upon a finding by a jury that she was a nuisance under s. 521 of Act X. of 1872, which is the same as s. 133 of the Criminal Procedure Code of 1882, the order was set aside. The Court said: "If she made her house the resort of bad characters, or filled it with noisy dwellers at night, or entertained her admirers with music or disreputable nautches, her continuance where she is might well be a discomfort amounting to a positive nuisance to the neighbourhood. It may be very unpleasant to have such a neighbour, but so long as the woman behaves herself orderly and quietly, and creates no open scandal by riotous living, I do not see how the law can interfere with her."[1] In the Presidency towns ample powers for the removal of brothels are given by the various Town Police Acts.[2] Even under these acts a house in which a prostitute dwells, and in which she is constantly visited by men is not a brothel. The term in its legal acceptation applies to a place resorted to by persons of both sexes for purposes of prostitution.[3]

§ 368. In America several cases have arisen where it has been attempted to bring within the law of nuisance, cases in which acts have exercised a disturbing influence upon the minds of persons entertaining particular religious opinions. As, for instance, where proceedings were instituted to stop the running of tramcars on Sunday, on the ground that it prevented the plaintiffs from enjoying the sabbath as a day of rest and religious exercise. The Court refused to grant an injunction. They thought that the rule was, that the injury must be one which would affect all alike who come within the influence of the disturbance. It must be something about the effects of which all agree. Otherwise that which might be no nuisance to the majority, might be claimed to deteriorate property by particular

[1] *Nundo Kumaree* v. *Anund Mohun*, 24 Suth. Cr. 68.
[2] Bengal Act, IV. of 1866, s. 43; Madras Act, VIII. of 1867, s. 30.
[3] *Singleton* v. *Ellison* (1895), 1 Q.B. 607.

persons.[1] The same principle has been repeatedly acted upon in India. In one case the defendants, who were Labis, were convicted on the charge of having caused a public nuisance under s. 268, by placing a Mohammedan symbol, during the Mohurrum festival, on a part of the village waste, in the neighbourhood of Hindu temples, whereby they were likely to cause serious annoyance to the Hindu public. The conviction was set aside by the Madras High Court. Turner, C.J., said: "It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of adherents of other creeds residing in the neighbourhood; but the Penal Code does not regard such an act as a public nuisance. The scope of the provision we are considering is to protect the public, or people in general, as distinguished from the members of a sect."[2] This decision was followed by the Bombay High Court, in a case where the accused had been convicted of a nuisance, by exposing meat that was about to be cooked for a feast, to the annoyance of certain Jains who were on the road to their temple.[3] Nor is the mere slaughtering of animals in a private place, and at an hour when people are not likely to be about, a nuisance, though it was possible that the act might be witnessed by persons whose special tenets rendered it offensive to them. But the wilful slaughtering of animals in a public street, in a manner to cause pain and disgust to all persons of ordinary humanity, would be punishable under s. 290.[4]

§ 369. The definition in s. 268 treats as sufficiently constituting a nuisance, "any act which causes any common injury or annoyance to the public." Taking this in its literal sense, floating blacks from a chimney, which entered a window and soiled a carpet, or the whistle of a railway engine which awoke people at night, might be indictable. I imagine, however, that these general terms must be taken only as indicating the nature of the acts or omissions which

[1] Bigelow. Torts. 470.
[2] *Muttumira* v. *Reg.*, 7 Mad. 590.
[3] *Reg.* v. *Byramji*, 12 Bom. 437.
[4] *Reg.* v. *Zakiuddin*, 10 All. 44. See also *Satku* v. *Ibrahim*, 2 Bom. 457; *Kasi Sujaudin* v. *Makhavdas*, 18 Bom. 693.

constitute a nuisance, while, as to degree, the facts of each case must be governed by the rules of common sense, as pointed out by s. 95, and by the well-known practice in such matters laid down by the English courts. In a leading case on nuisances,[1] Lord Westbury, C., said: "It is a very desirable thing to mark the distinction between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible discomfort." "If a man lives in a town, it is necessary that he should submit himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large." "But when an occupation is carried on by one person in the neighbourhood of another, and the result of that occupation is a material injury to property, then there unquestionably arises a very different consideration. I think that, in a case of that description, the submission which is required from persons in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of his property." In the same case, Lord Wensleydale said, at p. 653: "Everything must be looked at from a reasonable point of view. Therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected." In that case it was proved that the fumes arising from copper smelting works caused injury to vegetation, and to the health of the cattle, and this was held to amount to a nuisance.

§ 370. As regards personal discomfort arising from noxious fumes, smells, and the like, it was long ago laid down by Lord Mansfield, C.J., that, "It is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable."[2]

[1] *St. Helens Smelting Co.* v. *Tipping*, 11 H.L. Ca. 642, at p. 650.

[2] *R.* v. *White*, 1 Burr., at p. 337; *per* Abbott, C.J., *R.* v. *Neil*, 2 C. & P. 485; *Malton Board of Health* v. *Malton Manure Co.*, 4 Ex. D. 302. The vitiation of the atmosphere so as to make it noxious to health is specially punishable by s. 278.

As to the degree of personal discomfort which constitutes a nuisance, Knight Bruce, V.C., said: "The important point for decision may properly be thus put: Ought this inconvenience to be considered as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people."[1] In considering this question, however, regard must be had to the character of the locality, and the class of persons of whom the public is composed. To make a nuisance indictable, it must be a nuisance to the public or to the people in general, not merely to a few persons, drawn from a higher class and accustomed to a higher standard of comfort than their neighbours. Where any act or occupation causes an undoubted public nuisance, a person who is charged with such a nuisance cannot plead that a number of other persons are committing other nuisances as bad as, or worse than, his own, and that his contribution to the general annoyance is a merely imperceptible addition. As Abbott, C.J., said: "The presence of a number of nuisances will not justify any one of them, or the more nuisances there were the more fixed they would be."[2] But when you come to consider whether discomfort, which might be fairly considered a nuisance to a private individual, is a nuisance to the public, it is important to consider how the public choose to live. In *St. Helens Smelting Co.* v. *Tipping*, Lord Cranworth referred to a case tried before himself for a private nuisance arising from smoke in the town of Shields, where he had said to the jury, "You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in Shields; because if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance."[3] In a similar case, the Court said, with reference to the tanneries of Bermondsey, or to any other locality devoted to a particular trade or manufacture of a noisy or unsavoury

[1] *Walter* v. *Selfe*, 4 De G. & Sm. 315, at p. 322; S.C. 20 L.J. Ch. 433.

[2] *Rex* v. *Neil*, 2 C. & P. 485; *Crossley* v. *Lightowler*, L.R. 2 Ch. 478.

[3] 11 H.L. Ca., p. 653.

character: "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgravia would not necessarily be a nuisance in Bermondsey."[1]

§ 371. Where an act is a nuisance to the public, it is no defence that it is in itself a perfectly lawful act, and that it is done upon a man's own ground, in a convenient place, and in a proper manner, for the illegality consists in using your own property so as to harm the public.[2] Nor is it any answer, that the injury to the public is more than counterbalanced by the benefits resulting from the act or occupation complained of to the general community, or to the locality itself.[3] Nor that the acts complained of were continuously done in the same place before the public came there; for this is only saying that the acts were lawful when they began, and were continued after they became unlawful.[4] Nor that the nuisance had continued during a length of time which would have established an easement as against a private person. For no lapse of time can bar an indictment which is brought by the Crown for the protection of the community.[5] Where, however, private property has been dedicated to the public, subject to an obstruction or a right of user, which would be a nuisance if commenced after the dedication, no action or indictment will lie. The thing complained of is not an infringement of the public right, but a limitation of it.[6]

§ 372. Where the Legislature authorizes the doing an act which would otherwise be a nuisance, of course no indictment will lie for the necessary consequences which follow from the doing of that act. Where a railway company was authorized to make a line parallel to and adjoining a highway, it was held that they could not be indicted

[1] *Sturges* v. *Bridgman*, 11 Ch. D., at p. 865.

[2] *Bamford* v. *Turnley*, 3 B. & S. 62; S.C. 31 L.J. Q.B. 286; *Cavey* v. *Lidbetter*, 13 C.B. N.S. 470; S.C. 32 L.J. C.P. 104; *Rajmohun Bose* v. *E. I. Ry. Co.*, 10 B.L.R., at p. 253.

[3] *R.* v. *Ward*, 4 A. & E. 384, at p. 404; *Reg.* v. *Train*, 2 B. & S. 640; S.C. 31 L.J. M.C. 169.

[4] *Sturges* v. *Bridgman*, 11 Ch. D., p. 865; *per* Lord Halsbury, *Fleming* v. *Hislop*, 11 App. Ca., p. 697.

[5] *Per* Lord Ellenborough, C.J., *R.* v. *Cross*, 3 Camp. 227; *Weld* v. *Hornby*, 7 East, p. 199; *Municipal Commissioners of Calcutta* v. *Mahomed Ali*, 7 B.L.R. 499; S.C. 16 Suth. Cr. 6.

[6] *Fisher* v. *Prowse*, 31 L.J. Q.B. 212; S.C. 2 B. & S. 770; *Arnold* v.

for a nuisance, because the engines and trains frightened horses on the high road.[1] Nor is there any obligation on the company to erect screens to conceal the engines, or to take any such extraordinary precautions beyond what are implied in conducting their business in a careful and proper manner.[2] In all such cases it must be determined upon the wording of the particular statute, and upon the facts of the case, whether the Legislature intended that the thing complained of should be done, even though it created a nuisance,[3] or merely authorized the doing of it, provided it could be done without being a nuisance.[4] Nor in any case can the authority of the Legislature be relied on, where the proceeding authorized by it might have been carried out in a manner which would not cause a nuisance. Where persons were empowered to cut channels through a highway to make a line of navigation, this threw on them the obligation to build a bridge over the channel.[5] A railway company which is permitted to construct their line on a level-crossing over a highway, is bound to construct it so that carriages may cross the rails without injury.[6] An authority to erect workshops or cattle-docks is not an authority for placing them where they will be an injury to others.[7] An authority to construct a tramway authorizes the company to create a certain amount of obstruction on the road, but not to collect such a number of horses in a stable near the road as to be a nuisance to the neighbours.[8]

§ 373. A summary mode of removing nuisances is provided by Chapter X. of the Criminal Procedure Code of 1882.

"Whenever a district magistrate, a sub-divisional magistrate, or, when empowered by the Local Government in this

[1] *R.* v. *Pease*, 4 B. & Ad. 30; *per* Lord Cairns, *Hammersmith Ry. Co.* v. *Brand*, L.R. 4 H.L., p. 215; *per* Lord Blackburn, *Metropolitan Asylum* v. *Hill*, 6 App. Ca., p. 203; *London and Brighton Ry. Co.* v. *Truman*, 11 App. Ca. 45.

[2] *Simkin* v. *London and North-Western Ry. Co.*, 21 Q.B.D. 453; *per* Lord Blackburn, *London and Brighton Ry. Co.* v. *Truman*, 11 App. Ca., p. 617.

[3] *London and Brighton Ry. Co.* v. *Truman*, 11 App. Ca. 45.

[4] *Metropolitan Asylum District* v. *Hill*, 6 App. Ca. 193, explained, 11 App. Ca., pp. 53, 57, 63; *Reg.* v. *Bradford Navigation Co.*, 32 L.J. Q.B. 191; S.C. 6 B. & S. 631.

[5] *R.* v. *Kerrison*, 3 M. & S., p. 531.

[6] *Oliver* v. *North-Eastern Ry.*, L.R., 9 Q.B. 409.

[7] *Rajmohun Bose* v. *East India Ry. Co.*, 14 B.L.R. 241.

[8] *Rapier* v. *London Tramways Co.* (1893), 2 Ch. 588.

behalf, a magistrate of the first class, considers, on receiving a report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river, or channel which is or may be lawfully used by the public, or from any public place, or

that any trade or occupation, or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed or prohibited, or

that the construction of any building, or the disposal of any substance as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence its removal, repair, or support is necessary, or

that any tank, well, or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public,—

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing, or controlling such building, substance, tank, well, or excavation, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to suppress or remove such trade or occupation; or

to remove such goods or merchandise; or

to prevent or stop the construction of such building; or

to remove, repair, or support it; or

to alter the disposal of such substance; or

to fence such tank, well, or excavation, as the case may be; or

to appear before himself or some other magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided.

No order duly made by a magistrate under this section shall be called in question in any civil court.

Explanation.—A 'public place' includes also property belonging to the State, camping grounds, and grounds left

for sanitary and recreative purposes" (s. 133).

laid down in s. 134. On being so served, the person may either obey it, or show cause against it, or apply to have a jury appointed to try whether the order is reasonable and proper (s. 134). If he takes no such step; or if, on his showing cause, the magistrate takes evidence and confirms the order; or if, upon reference to a jury, the order is pronounced to be reasonable and proper, with or without modification, the order is made absolute, and disobedience to it is punishable under s. 188 of the Penal Code (ss. 136, 137, 139). If the act is not performed, the magistrate may perform it himself, and recover the costs by the sale of any building, goods, or other property removed by his order, or by the distress and sale of any other movable property of such person within or without the local limits of such magistrate's jurisdiction. No suit shall lie in respect of anything done in good faith under this section (140).

Very large powers are also given by the various Municipal Acts, for the abatement of nuisances of all sorts,[1] and for the prevention of infectious diseases.[2]

§ 374. Sections 269 and 270 make it a punishable offence to do any act which is, and which the accused knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life. It is further necessary, under the former section, that the act should have been done unlawfully or negligently; under the latter section, malignantly, which, I suppose, means with a deliberate intention that the above result should follow. If a death ensued from an act done under s. 270, it would undoubtedly be murder. Section 269 agrees with the English common law. It is not an offence to inoculate with small-pox, when done *bonâ fide* as a remedial measure;[3] but it is an offence to carry a child suffering from small-pox through the public streets, or into any place of public resort, without necessity;[4] or to enter a railway carriage when suffering from cholera;[5] or to take

[1] For Calcutta, Bengal Act, II. of 1888, ss. 221—316; for Burmah, Act XVII. of 1884, ss. 76—105, amended by Act XXI. of 1891; for the Punjab, Act XX. of 1891, ss. 90—136; Bombay Act, VI. of 1873, ss. 30—79; Madras Act, I. of 1884, ss. 283—367.

[2] Act XVII. of 1884, ss. 126, 127; Act XX. of 1891, ss. 139—141; Bengal Act, II. of 1888, ss. 321—334; Madras Act, I. of 1884, ss. 368—377.

[3] *Rex* v. *Burnett*, 4 M. & S. 272; see Penal Code, ss. 81, 87—99; Mad. H.C. Rulings, 10 July, 1867; S.C. Weir 71 [95].

[4] *Rex* v. *Vantandillo*, 4 M. & S. 73; *Rex* v. *Burnett*, *ibid.* 272.

[5] *Reg.* v. *Krishnappa*, 7 Mad. 276.

a glandered horse into a public place, to the danger of persons whom it might infect.[1]

§ 375. The duty not to spread infectious illness and the limitations upon that duty, were fully examined by Lord Blackburn in the case of the *Metropolitan Asylum District* v. *Hill*,[2] where it had to be decided whether a small-pox hospital was a public nuisance. He pointed out that *primâ facie* it was an indictable offence to take an infected person into any place where he would come into contact with other persons, but that it would be a defence to an indictment if it could be shown that there was a sufficient reason to excuse what is *primâ facie* wrong. As, for instance, where those who have charge of a person suffering from an infectious disorder have not the means of isolating him from others; or where they can in no other way discharge their legal obligation of doing their best to procure advice and assistance for him; or where some overwhelming necessity, such as a fire in the house, compels them to carry the patient through a crowd. A similar question arose in Bombay, where an action was brought against a steamship company for breach of contract in not shipping five hundred pilgrims from Bombay to Jeddah. The plea was that the pilgrims had arrived at Bombay from Singapore in a ship in which small-pox had broken out on the voyage, and that on the day on which they should have been shipped, fresh cases were occurring—not among the five hundred tendered for shipment, but amongst the others,—and that the shipment of the five hundred would have been an act punishable under s. 269. This plea was held to be insufficient, apparently on the ground that the company might, by taking sufficient precautions, have shipped the five hundred so as not to endanger any one else, and that their contract bound them to do so, if it was in any way possible.[3]

§ 376. Except for the contrary opinion of so eminent an authority as Sir Raymond West, I should have thought it absolutely certain that this section would apply to the case of any person who, knowing that he or she was suffering from syphilis, solicited or consented to connection with another. It is, and must be known to be, a necessary result that the disease will be communicated, and its dangerous consequences are equally known. Where, however, a prostitute

[1] *J.* v. *Henson*, Dearsl. 24. [2] 3 App. Ca. 193, pp. 204, 205.
[3] *Bombay and Persia Steamship Co.* v. *Rubattino Co.*, 14 Bom. 147.

had been convicted under this section for communicating syphilis to the prosecutor, whom she had assured that she was healthy, the conviction was set aside by the High Court of Bombay. West, J., said: "Assuming that there was dangerous disease, and culpable negligence, still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person and himself generally an accomplice."[1]

It may, however, be suggested with all respect for the learned judge, that neither reason is satisfactory. The intervention of the prosecutor merely amounted to this, that in doing an act which was immoral but lawful, he exposed himself to a risk which he did not intend to incur, and which, on the assurance of the defendant, he did not believe he was incurring. Suppose a man enters a gambling saloon, which is kept by a person who is in the infectious stage of small-pox, could it be contended that his "intervention" would be an answer to a charge against the other, if he were to sicken of the disease? As to his being an accomplice, it is difficult to understand in what sense the word is used, or how the circumstance could be relevant. Upon the statement of the case, he certainly was not an accomplice in an offence under s. 269, as he did not believe the woman was committing such an offence. He was an accomplice in the commission of an immoral act. But even an accomplice in an illegal act, such as a burglary, would be entitled to complain if his associate tried to kill him during the commission of the crime.

A similar question arose, under a different branch of the law, in the case of *Reg.* v. *Clarence*.[2] There a husband was indicted under 24 & 25 Vict., c. 100, ss. 20 and 47, for inflicting grievous bodily harm, and for an assault occasioning actual bodily harm, upon his wife. The facts were that he had intercourse with her while suffering from venereal disease of which she was not aware. If she had been aware she would not have consented. It was necessary, under the statute, to make out an assault, which could not be where the act was consented to. The conviction had to rest upon the principle that a consent obtained by fraud under a mistake of fact, is not a consent. Acting upon this principle, Willes, J., had, in two cases, convicted of assault, where the prisoner had communicated disease to girls, who

[1] *Reg.* v. *Rakma*, 11 Bom. 59.

[2] 22 Q.B.D. 22.

consented to the intercourse in ignorance of the disease.[1] Hawkins and Field, JJ., thought the conviction was right. The rest of the Court reversed it. It is submitted that this decision has no bearing upon the present question, which is simply, whether a particular act comes within the letter and spirit of a particular section. If it does, the fact that incalculable benefit may be effected by enforcing it, can be no reason for allowing it to lie idle.

§ 377. **Negligence.**—Sections 279—289 contain a series of provisions by which mere negligence is made punishable, apart from any injury actually done. It is plain that the essence of the offence consists in the possibility of injury, and not in its actual occurrence, as all the clauses contain the words "likely to cause hurt or injury," or words of a similar nature. The occurrence of actual injury meets with punishment under ss. 337 and 338; though, strangely enough, the actual inflicting of hurt is liable to less punishment under s. 337 than the commission of the same act would be if no hurt resulted. Nor is it necessary that there should be any intention to injure, or reason to anticipate the particular injury that ensued, if it was in fact caused by the defendant's negligence.[2] It is sufficient if the carelessness is such as does cause, or is likely to cause, injury.

Legal negligence is something more than carelessness. It involves some act or omission, which is a breach of the duty which the person charged owes to somebody, who suffers or may suffer an injury in consequence. There must be an obligation to take care before any one can be punished, either civilly or criminally, for not taking care.[3] The obligation may arise by contract, or by statute, or may be implied by law from the relation between the parties, or from the nature of the act done; but it cannot be assumed. "The definition of negligence is the omitting to do something which a reasonable man would do, or the doing something which a reasonable man would not do." Each case must be judged in reference to the precautions which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident

[1] *Reg.* v. *Bennett*, 4 F. & F. 1105; *Reg.* v. *Sinclair*, 13 Cox, 28, doubted in Ireland; *Hegarty* v. *Shine*, 13 Cox, 124.

[2] *Smith* v. *London and South-Western Ry. Co.*, L.R., 6 C.P. 14.

[3] *Gautret* v. *Egerton*, L.R., 2 C.P. 371; *Collis* v. *Selden*, L.R., 3 C.P. 495.

which happened.[1] On the other hand, it is not enough to show that the person accused acted *bonâ fide*, and to the best of his skill and judgment. The rule requires in all cases a regard to caution such as a man of ordinary prudence would observe. Where the act that is being done requires special skill, those who do it are bound to conduct themselves in a skilful manner,[2] unless the necessity of the case forces an unskilled person to make the attempt.

How far a master may be liable criminally for the acts of his servants is a question which has already been discussed (*ante*, §§ 13—17). It is only necessary to refer to that discussion, and to repeat generally, that negligence, to be criminal, must be the personal act of the person charged; that is, he must either have ordered the act to be done in an improper manner, or he must have omitted the precautions which he was bound individually to take, or he must have knowingly employed an incompetent person.

§ 378. It is incumbent on the prosecution to prove not only that there was negligence on the part of the defendant, but that the negligence caused or materially contributed to the injury, if any happened; or was so likely to cause injury as to be punishable under some particular section of the Code, where none has happened. Where the facts are equally consistent with the guilt or innocence of the person accused, the case fails. For instance, where a person is run over by a carriage or train, and there is no evidence that the accident arose from any carelessness on the part of the driver, there is nothing to show that the vehicle ran over the man rather than the man against the vehicle.[3] On the other hand, "where the thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen to those who have

[1] *Per* Alderson, B., *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; S.C. 25 L.J. Ex. 212, adopted by Brett, J., *Smith* v. *London and South-Western Ry. Co.*, L.R., 5 C.P., at p. 102.

[2] *Jones* v. *Bird*, 3 B.N.C. 837; *Vaughan* v. *Menlove*, 5 B. & A. 468, p. 475.

[3] *Cotton* v. *Wood*, 8 C.B. N.S. 568; S.C. 29 L.J. C.P. 333; *Wakelin* v. *London and South-Western Ry. Co.*, 12 App. Ca. 41; 6 Mad. H.C. Rulings 32; see, too, *Hammuck* v. *White*, 11 C.B. N.S. 588; S.C. 31 L.J. C.P. 129, where Willes, J., citing 1 East. P.C. 264, suggested that, where death had followed, the person who caused it ought to show that he took that care to avoid it, which persons in similar situations are most accustomed to do.

the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."[1] Accordingly, where a man was walking along a public highway, and goods which the defendant was raising or lowering by machinery fell upon him, it was held that in the absence of explanation from the defendant as to how the accident occurred, negligence must be assumed.[2]

§ 379. In all cases of this sort, it is most important to distinguish between the weight of evidence to prove negligence, and the existence of any evidence from which it can be inferred. In *Cotton* v. *Wood*, referred to above, Williams, J., said: "I wish to add that there is another rule as to leaving evidence to a jury, which is of the greatest importance, and that is, that where the evidence is equally consistent with either negligence or no negligence, it is not competent for the judge to leave it to the jury to find either alternative, but it must be taken as amounting to no proof at all." The same rule was laid down by Lord Cairns, C., in a case which is now the governing decision upon this point. He said: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may be reasonably inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold

[1] *Per* Erle, C.J., *Scott* v. *London Dock Co.*, 3 H. & C. 596; S.C. L.J. Ex. 220.

[2] *Byrne* v. *Boadle*, 2 H. & C. 722; S.C. 33 L.J. Ex. 13; *Scott* v. *London Dock Co.*, *ub. sup.*; *Kearney* v. *London, Brighton, and South Coast Ry. Co.*, L.R., 6 Q.B. 759. For a case where an accident occurred on the premises of the defendant, but there was nothing to connect the defendant with the person whose act probably led to the accident, see *Welfare* v. *London and Brighton Ry. Co.*, L.R., 4 Q.B. 693.

that negligence might be inferred from any state of facts whatever."[1]

§ 380. According to the rules of civil law, even although the defendant has been guilty of negligence, still, if that negligence would have been harmless only for equal or greater negligence on the part of the plaintiff, the latter cannot recover.[2] This doctrine of contributory negligence is not, however, a defence in criminal as it is in civil cases.[3] The object of a suit is to recover damages for an injury, and it is fair that such damages should not be recovered, if the plaintiff has brought the harm upon himself. The object of an indictment is to protect the public, and it will be sustainable if the defendant has been in fault, even though some one else may have been equally in fault. The question will still be: Did he rashly or negligently do an act which was likely to endanger the public? If he did, the fact that the actual injury to a member of the public was brought about by the carelessness of the latter, will be no defence.

§ 381. The word "injury," in ss. 279, 283, 285, 286, and 287, has been held by the Bombay High Court, in a case arising under s. 285, to include injury to the property of any one as well as his life.[4]

In cases under s. 279 the defence will generally be that the act complained of was merely an accident; as, for instance, that a horse got out of control;[5] that the signals on a railway could not be seen at all, or in sufficient time, or the like.[6] Similar considerations will arise under s. 280.

§ 382. The offence dealt with by s. 282, is where a person conveys a passenger for hire in a vessel which is so unseaworthy, either from its own condition or from the way in which it is loaded, as to endanger his life. It is not sufficient that it was in that state; it must have been known by the defendant to be in such a state, or he must have occupied such a position that his ignorance of it amounts to negligence. The owner of a ship would be bound to take all proper precautions to ascertain whether his ship was

[1] *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Ca. 193, at p. 197. So held by the Madras High Court (6 Mad. H.C. Rulings 32).
[2] *Radley* v. *London and North-Western Ry.*, 1 App. Ca. 754.
[3] 6 Mad. H.C. Rulings 32; *post*, § 412.
[4] *Reg.* v. *Natha Lalla*, 5 Bom. H.C. C.C. 67.
[5] *Hammack* v. *White*, 11 C.B. N.S. 588; S.C. 31 L.J. C.P. 129; *Manzoni* v. *Douglas*, 6 Q.B.D. 145.
[6] See *Accident*, *ante*, § 158.

seaworthy or not. The manager of a booking-office, at which passengers are supplied with tickets for any vessel they wish to select, would be under no such obligation. It is also to be remembered that seaworthiness is a relative term, and merely means fitness to perform the service which the vessel is about to undertake. A ship may be fit to undertake a small coasting voyage, with an ordinary cargo, when it would not be fit to go to China in the typhoon season, or to carry a load of machinery.[1] Where acts, which would otherwise come within this section, endanger the life of a person who is not being carried for hire, they will be punishable under s. 336.

§ 383. The offence constituted by s. 283, differs from that defined by s. 268 in this—that it is not necessary to show that the act complained of is a public nuisance. It is sufficient that it causes danger, obstruction, or injury, to any person in any public way or public line of navigation. Of course, an act which causes an injury, etc., to every one, must necessarily be an injury done to any one, but not *vice-versâ*. The liability results from the consequences to the individual harmed, not from any impropriety in the act itself. If there is a legal right to do the act, of course it is not punishable, unless improperly performed. Where a sewer had been made in a highway, or a fireplug had been fixed in it, under statutory authority, the defendant was not liable because the natural subsidence of the materials with which the trench had been properly filled left a hole in the highway, or because the wearing away of the road left the fireplug standing up, so that, in each case, a passer-by was injured.[2] It would, of course, be otherwise, if the statutory authority was negligently or improperly carried out. A railway company which is authorized to carry its line across a public highway, with the obligation to provide gates and fences at the spot, is liable for injuries suffered by any one who gets upon the line by reason of the absence of such gates and fences.[3] Similarly, there are some acts which are so necessary to the ordinary enjoyment of property, that they are lawful, even though they cause a temporary obstruction to the highway, such as the stoppage of carts to unload goods into a warehouse, or the erection of

[1] *Kopitoff* v. *Wilson*, 1 Q.B.D. 377.

[2] *Hyams* v. *Webster*, L.R., 4 Q.B. 138; *Moore* v. *Lambeth Waterworks*, 17 Q.B.D. 462.

Western Ry. Co., L.R., 9 Ex. 157.

a hoarding to protect the public while buildings are being repaired.[1] But a private person is not at liberty to break up the highway to lay gas or water-pipes for the use of his house.[2] The occasional inconvenience arising from crowds of persons or carriages blocking up the road when a private entertainment is being given is not punishable, if reasonable precautions are taken to mitigate the evil; but it is a nuisance that the streets should be blocked up night after night by crowds waiting to enter a theatre, and it would be punishable, even though only a single person complained that access to his house was obstructed.[3]

§ 384. It would seem that, under this section, obstruction to some person must be found either expressly, or, at all events, as a matter of necessary inference. When a policeman deposed that he "saw a bad-smelling net dried on the
ad by the side of the defendant's house, so as to cause
struction to persons passing by," the Court held that this
l not make it sufficiently "appear that obstruction was
aused to any particular individual or individuals."[4] But if the net had been hung so as to stop up the way, I imagine it would not have been necessary to prove that any particular person had in fact been obstructed. In a Bengal case it appeared that the defendants had set up a bamboo dam for the purpose of catching fish across the bed of a navigable river. It contained a movable portion, through which boats could pass, and it was guarded and lighted so as to prevent accidents happening. On these facts the High Court, without deciding whether there was any such injury to any particular person as was necessary to constitute an offence under s. 283, felt no doubt that the obstruction constituted a nuisance under s. 268, and was therefore punishable under the general clause, s. 290.[5]

Under this section also, as in all the similar cases, the danger or injury must be such as would naturally follow from the act. Therefore, where the facts were that the defendant, being possessed of land abutting on a public footway, excavated an area in the course of building a house

[1] *Herring* v. *Metropolitan Board of Works*, 34 L.J. M.C. 224; S.C. 19 C.B. N.S. 510.

[2] *Reg.* v. *Longton Gas Co.*, 29 L.J. M.C. 118.

[3] *Barber* v. *Penley* (1893), 2 Ch. 447, where the whole law as to nuisance to highways is discussed.

[4] *Reg.* v. *Khader Moidin*, 4 Mad. 235.

[5] *Petition of Umesh Chandra*, 14 Cal. 656.

immediately adjoining the foot-way, and left it unprotected, and a person walking in the night fell in, the defendant was held to be liable; though, in point of law, the party who fell in was off the road, and was in law a trespasser.[1] But the contrary was held where a man made a well in the middle of his field, through which there was a right-of-way, and a person, straying off the path at night, fell into it. Martin, B., after citing the last case with approval, said: "But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man going off a road in a dark night, and losing his way, may wander to any extent. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way." [2]

§ 385. In *Fletcher* v *Rylands*[3] a doctrine was laid down which is frequently referred to as extending the liability of owners of property to consequences following from acts which were in themselves lawful, and which did not become unlawful by virtue of any negligence on the part of the proprietor. There a landholder had constructed a reservoir upon his land, the water from which had escaped through some old shafts, of which no one appears to have been aware, into the plaintiff's mine. It was held that the defendant was liable on the ground, as expressed by Lord Cranworth, that "if a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." And so Lord Cairns, C., spoke of this as being "a non-natural use of the land, for the purpose of introducing into the close that which in its natural condition was not in or upon it." [4]

§ 386. This doctrine, however, is subject to two limita-

[1] *Barnes* v. *Ward*, 9 C.B. 392; *Hadley* v. *Taylor*, L.R., 1 C.P. 53; and see *Brown* v. *Eastern and Midland Ry. Co.*, 22 Q.B.D. 391.

[2] *Hardcastle* v. *South Yorkshire Ry. Co.*, 28 L.J. Ex. 139; S.C. 4 H. & N. 67; *Hounsell* v. *Smith*, 29 L.J. C.P. 203; S.C. 7 C.B. N.S. 731; *Binks* v. *South Yorkshire Ry. Co.*, 32 L.J. Q.B. 26; S.C. 3 B. & S. 244; see *Reg.* v. *Anthony Udayan*, 6 Mad. 280.

[3] L.R., 5 H.L. 330, at pp. 339, 340.

[4] See, too, *Smith* v. *Fletcher*, 2 App. Ca. 781.

tions. First, that it does not apply where the act, from which the injury arises, is the natural, proper, and necessary way of using the property, and is done for the public benefit, or for the common benefit of the person who does it, and the person who complains of it. As, for instance, the storing of water in tanks in India for agricultural purposes;[1] or in cisterns in houses for the general use of all who occupy the house.[2] Secondly, that it does not apply where the dangerous element has been let loose by some overpowering and unforeseen cause, such as is called by lawyers *vis major*, or the act of God. As, for instance, where the embankment of a reservoir was swept away by a rainfall of unprecedented violence following upon a thunderstorm. As to *vis major*, the Court said: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, not the act of God, or *vis major*, in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community."[3]

Different considerations from those discussed in *Fletcher* v. *Rylands* arise, where the dangerous matter has come upon a man's property without his own act or consent. In the case of *Whalley* v. *Lancashire and Yorkshire Railway*,[4] it appeared that, in consequence of an unprecedented fall of rain, water had accumulated to such an extent against the defendants' embankment that its safety was endangered. To protect themselves the railway company cut trenches in their embankment, with the result that the water passed through and flooded the plaintiff's land, which lay on a lower level. The jury found that the cutting of the trenches

[1] *Madras Ry. Co.* v. *Zemindar of Karvaitnugger*, 1 I.A. 364; S.C. 13 B.L.R. 209; S.C. 22 Suth. 279; *Ram Lall Singh* v. *Lill Dhary*, 3 Cal. 776.

[2] *Carstairs* v. *Taylor*, L.R., 6 Ex. 217; *Ross* v. *Fedden*, L.R., 7 Q.B. 661; *Anderson* v. *Oppenheimer*, 5 Q.B.D. 602.

[3] *Nichols* v. *Marsland*, 2 Ex. D. 1; see, too, *Box* v. *Jubb*, 4 Ex. D. 67.

[4] 13 Q.B.D. 131.

was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. Upon these findings it was held that the defendants were liable, as they had no right to protect their own property by transferring the mischief to the plaintiff's. At the same time it was admitted that if they had foreseen the danger and taken exactly the same steps to pass on the water when it came, they would have acted within their rights.[1]

§ 387. The fact that the owner has given permission to the public, or to a certain class of persons, to pass over his property does not make it a public way, so as to prevent his erecting dangerous constructions upon it, or even so as to cast upon him the obligation of fencing them round so as to guard against injury from them. Therefore, where the workmen in a Government dockyard were allowed to cross certain land within the premises in order to reach water-closets, and a Government contractor was allowed to erect machinery which crossed the shortest and most convenient, though not the only, way to these water-closets, and one of the workmen was injured by the machinery, it was held that no action was maintainable against the contractor.[2] But even in such a case the owner of the land is bound not to do anything likely to cause injury to those who came upon the land by his permission without giving them due notice, or otherwise placing it in their power to protect themselves. Therefore, where upon a private road, along which persons were in the habit of passing with the owner's permission, the defendant placed building materials, and gave no notice, by signal or otherwise, it was held that he was liable for the injury which accrued to a passer-by. Willes, J., said: "The defendant had no right to set a trap for the plaintiff. A person coming on lands by licence has a right to suppose that the person who gives him the licence will not do anything which causes him injury."[3] A still stronger obligation lies upon the owner of private property who invites the public to make use of it for business purposes, as a wharf or a market. He is bound to keep it in such a safe condition that those who enter upon it shall not be endangered

[1] See *King* v. *Pagham*, 8 B. & C. 355.

[2] *Bolch* v. *Smith*, 31 L.J. Ex. 201; S.C. 7 H. & N. 736; *Gautret* v. *Egerton*, L.R., 2 C.P. 371.

[3] *Corby* v. *Hill*, 27 L.J.C.P. 318; S.C. 4 C.B. N.S. 556; and see *Bolch* v. *Smith*, *ub. sup.*

by its condition.[1] None of these cases, however, would come under s. 283, though they might be punishable under s. 290.

§ 388. Under s. 283, the person liable is the person who is in possession or charge of the property. *Primâ facie* this person is the actual occupant, whether he is the owner or tenant, and it makes no difference in the latter case that, as between himself and his landlord, the latter is liable to make repairs. In an old case, the defendant was indicted for not repairing a house standing ruinous upon the highway, and likely to fall: just such a case as is pointed to by s. 283. The indictment alleged that he was bound to repair *by reason of the nature of his holding*, and the verdict found that he was a tenant-at-will, who certainly is not bound to repair as regards himself and his lessor. But the Court held that the statement that he was bound to repair by reason of his holding was "only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier and not to the estate, which is not material in such case to the public."[2]

According to civil law, and *a fortiori* according to criminal law, a landlord is not liable merely because premises in the occupation of a tenant are in such a state as to amount to a nuisance.[3] Nor does he become liable for a nuisance created by a tenant merely because, when the tenancy came to an end, he renewed it, the property with the nuisance on it never having got back again into his hands.[4] If, however, he has himself created the nuisance, he is of course the person liable,[5] and if the nuisance is one of a continuing character, he does not free himself from liability by letting the premises to a tenant.[6] The occupation of servants or

[1] *White* v. *Phillips*, 15 C.B. N.S. 245; S.C. 33 L.J. C.P. 33; *Lax* v. *Darlington*, 5 Ex. D. 28; *Miller* v. *Hancock* (1893), 2 Q.B. 177.

[2] *R.* v. *Watts*, 1 Salk. 357; *per* Littledale, J., 5 B. & C., p. 560, affd. 6 M. & W., p. 510.

[3] *Russell* v. *Shenton*, 3 Q.B. 449; *Nelson* v. *Liverpool Brewery Co.*, 2 C.P.D. 311.

[4] *Bowen* v. *Anderson* (1894), 1 Q.B. 164.

[5] *Draper* v. *Sherring*, 30 L.J. M.C. 225.

[6] *R.* v. *Pedly*, 1 A. & E. 822; *Thomson* v. *Gibson*, 7 M. & W. 456; *Todd* v. *Flight*, 9 C.B. N.S. 377; S.C. 30 L.J. C.P. 21.

agents will be the occupation of their employer, though of course they would be personally liable for any nuisance created by themselves.[1]

§ 389. The Municipal Acts in India, following those in England and the colonies, vest the highways in the statutory body created by the Act, and clothe it with various powers and duties in regard to the repair and maintenance of the highways. In some cases this obligation is limited by a provision that it shall only exist "so far as the funds at their disposal will admit." In *Mersey Docks* v. *Gibbs*,[2] Blackburn, J., in delivering the opinion of the judges, said: "In our opinion the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose upon a private person doing the same things." Accordingly, where a municipality had constructed a barrel drain in the highway, and then allowed it to fall out of repair, so that it became a hole into which a man and horse fell, Sir Barnes Peacock said: "Their Lordships are therefore of opinion that the applicants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance on the highway, for which they were liable to an indictment. This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty."[3]

§ 390. Where the charge against the municipality or other statutory body is for mere non-feasance, or neglect to repair the roads in their charge, more difficult questions arise. In England it has been laid down generally, "that wherever a statute prohibits a matter of public grievance to the liberties or security of a subject, or commands a matter of public convenience, as the repairing of the common

[1] *Rich* v. *Basterfield*, 4 C.B. 783; S.C. 16 L.J. C.P. 273; 5 B. & C., p. 560.

[2] L.R., 1 H.L., at p. 110, folld. *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Ca., p. 412.

[3] *Borough of Bathurst* v. *Macpherson*, 4 App. Ca. 256, at p. 267, explained in *Municipality of Picton* v. *Geldert* (1893), A.C. 525, at p. 531, and *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, followed *Corporation of Calcutta* v. *Anderson*, 10 Cal. 445.

streets of a town, an offender against such statute is punishable by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."[1] Where, however, as in the case of municipal or similar authorities, the obligation rests entirely on statute, it is necessary to ascertain whether the statute which vests the roads in a particular authority, imposes upon it an absolute obligation to keep them in repair, or only empowers and desires the authority, as part of its function, to do so. In arriving at a conclusion on this point, it is material to inquire whether the clause which is relied on as creating an absolute obligation, is in the same words as other clauses, which are only discretionary. It is also material to consider whether any indication of an attempt to enforce the obligation is given by annexing penalties for its breach, or by providing any procedure in case of default.[2] Where there is such a distinct duty imposed, those guilty of a breach of that duty are, in England, liable to an indictment for a misdemeanour; otherwise they are not.[3] Under the Penal Code, however, mere breach of a statute is not sufficient, unless it is attended with some of the consequences or intentions specified in some particular section. Further, where the neglect results in an injury to an individual, it will be further necessary to show that, as regards that individual, the statute intended to impose a duty which the authority negligently failed to perform. If a statute directs the performance of a duty for the purpose of maintaining a road, and a neglect to perform it causes injury to private property adjoining the road, no action would lie against the authority by the proprietor.[4] An indictment founded on the assumption that there had been any neglect of duty towards the injured person would probably fail. It must be remembered that none of these decisions apply where the public body is under contract with the individual for remuneration.[5]

§ 391. A liability founded upon the fact that property is in the possession or under the charge of any one cannot last after his possession or charge has been brought to an end.

[1] 2 Hawk. P.C. 289.

[2] "When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question," *per curiam*, *Redpath* v. *Allen*, L.R., 4 P.C. 511.

[3] *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433.

[4] *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Ca. 400.

[5] *Brabant* v. *King* (1895), A.C. 632.

Accordingly, where the defendants' vessel, owing to the negligence of their servants, struck on a sand-bank, and becoming from that cause unmanageable was driven by the wind and tide upon a sea-wall of the plaintiffs' which it damaged, it was held that the defendants were liable for the damage so caused. The vessel then became a wreck, and could only be removed by being broken up. She had valuable property on board, and was broken up, not as fast as she might have been, but as fast as was consistent with the removal of the property. During the interval that elapsed between her becoming a wreck and the final breaking up she did further injury. It was held that for this the defendants were not responsible, as they were entitled to remove the property before breaking her up.[1] And if the defendants had chosen to abandon the wreck at once, they might have done so without breaking her up.[2]

§ 392. **Animals.**—Section 289 deals with the improper or careless management of animals. The principal point to be considered under this section will be the knowledge that the defendant had of the dangerous properties of the animal. Where the very nature of the animal gives him warning, his knowledge will be assumed; as, for instance, if a person were to make a pet of a tiger, or a bear. Otherwise, express knowledge will have to be shown, in order to involve the necessity of unusual caution. Where injury is done by a horse, a pony,[3] a bull, or a dog, and it is not shown that the animal was peculiarly vicious, or that his vice was known to his master, no indictment could be maintained, unless he had neglected the ordinary precautions employed by every one who uses such animals.[4] But if the animal had shown a savage disposition to the knowledge of the owner, it would not be necessary to show that he had actually injured any one.[5] In considering the knowledge of the master, it is material to inquire what knowledge as to the dangerous propensities of the animal was possessed by his servants. Their knowledge will not necessarily be imputed

[1] *Bailiffs of Romney Marsh* v. *Trinity House*, L.R. 5 Ex. 204, affd., L.R. 7 Ex. 217.

[2] *Brown* v. *Mallett*, 5 C.B. 599, the Douglas, L.R. 7 P.D. 151.

[3] *Reg.* v. *Chand Manal*, 19 Suth. Cr. 1.

[4] *Hammack* v. *White*, 31 L.J. C.P. 129; S.C. 11 C.B. N.S. 588; *Cox* v. *Burbidge*, 13 C.B. N.S. 430; S.C. 32 L.J. C.P. 89; 3 Mad. H.C. Appx. xxxiii.; *Reg.* v. *Projonarain*, 2 Suth. Cr. 51; *Reg.* v. *Mozaffar Khalifa*, 9 B.L.R. Appx. 36.

[5] *Worth* v. *Gilling*, L.R. 2 C.P. 1.

to him, but it will be a question for the jury whether the persons who received actual notice of such facts stood in such a relation to the defendant that it was their duty to communicate the notice to him, and whether in fact they did communicate it.[1]

§ 393. Where the animal is known to be mischievous, or is of the class of undomesticated animals, which from their nature are dangerous, though capable of being brought under a certain degree of subjection, the rule of civil law seems to be to infer negligence absolutely, from the mere fact that an injury has followed. Where the injury arose from a savage monkey, Lord Denman laid down the law as follows: "The conclusion to be drawn from an examination of all the authorities appears to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril;* and that if it does mischief, negligence is presumed, without express averment. The negligence is in keeping such an animal after notice.[2] This case was followed, and the general principle approved, where the injury was caused by an elephant which was being exhibited by the defendants.[3]

It is probable, however, that the interpretation of this section would be stricter, as is always the case where the doctrine of constructive negligence is applied to criminal law; and that if every proper and reasonable precaution had been taken, no criminal indictment would lie, even though the animal finally escaped and did damage. A good deal would also turn upon the lawfulness of the object for which the creature was kept. Even if it were legal negligence in a private person to keep a tiger for his own amusement or profit, the same doctrine would not be applied to a keeper of a Government menagerie. If it were, such an institution would become impossible. Again, it would be a different thing if it could be shown that the animal was justifiably kept for purposes of self-defence. Accordingly, where a man got into the garden of another by night and was there injured by a dog, and it appeared that the dog was kept for the protection of the garden, and was tied up all day, but was let loose at night: Lord Kenyon said: "That every

[1] *Baldwin* v. *Casella*, L.R. 7 Ex. 325; *Applebee* v. *Percy*, L.R. 9 C.P. 647, p. 658.

[2] *May* v. *Burdett*, 9 Q.B. 112; see *Fletcher* v. *Rylands*, L.R. 1 Ex. 281.

[3] *Filburn* v. *People's Palace Co.*, 25 Q.B.D. 258.

man had a right to keep a dog for the protection of his garden or house: that the injury which this action was calculated to redress was, where an animal known to be mischievous was suffered to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the animal had been properly let loose, and the injury had arisen from the plaintiff's own fault in incautiously going into the defendant's garden after it had been shut up."[1]

On the other hand, where a commoner turned out on a common, across which there were public footpaths, a horse which he knew to be vicious and dangerous, and it kicked and killed a child, it was held that he was criminally liable, though the child had strayed on to the common a little way off the path. And the majority of the judges seemed to be of opinion that the result would have been the same, though the child had strayed a considerable distance from the path.[2] Under s. 289 the question would be merely one of fact: was the danger which followed one which was rendered probable by letting loose such an animal in such a place?

The defendant is only bound to guard against probable danger; that is, such danger as may be calculated to arise from the nature of the beast itself. But I conceive that no indictment would lie if an injury arose to any one from his own obstinate and foolhardy conduct in venturing too near it, with full knowledge of its qualities. And even in civil cases, Lord Denman said, that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that might be a ground of defence.[3]

§ 394. Under all these sections, and especially under ss. 284—289, it will probably be held, in conformity with the principles of civil law, that much greater caution will be required in regard to the general public than will be called for in regard to a man's own servants, who are employed in any occupation of danger. Their employment is voluntary, and from its very nature gives them full notice of all the perils to which they are exposed, and of the precautions by which those perils may be avoided. In England nearly every occupation is fenced round with a network of duties, which are imposed upon the employer for the

[1] *Brock* v. *Copeland*, 1 Esp. 203.
[2] *Reg.* v. *Dant*, 34 L.J. M.C. 119; S.C. L. & C. 567.
[3] *May* v. *Burdett*, 9 Q.B. 113.

protection of those in his service. Every such statute fixes an obligation upon the employer, the neglect of which does render him civilly liable,[1] and may render him criminally liable according to the circumstances. In the absence of such statutory duty, it will be a question of fact, What are the dangers necessarily incidental to the duty undertaken, and what are the precautions which it is reasonable and proper to take, so as to diminish those dangers to a *minimum*? The owner of a passenger vessel is bound properly to fence in those parts of the ship to which the passengers resort, so that they may not fall overboard or into the engine-room. A much smaller amount of protection is possible as regards the crew, though every reasonable amount of protection should be afforded. A livery-stable keeper who knowingly sent a vicious untrained horse to a customer to ride, would be liable. He would not be so if he merely put a rough-rider upon the horse's back to break him in, though in fact the man were thrown and killed. But it would be his duty to give the man full notice of the danger he would encounter, not to call upon him to incur any unusual risk, and to supply him with everything that was proper to diminish the risk.[2]

[1] *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423.

[2] See, as to the general principle *volenti non fit injuria* and its limitations, *Woodley* v. *Metropolitan District Ry. Co.*, 2 Ex. D. 384; *Thomas* v. *Quartermaine*, 18 Q.B.D. 685; *Yarmouth* v. *France*, 19 Q.B.D. 647; *Thrussell* v. *Handyside*, 20 Q.B.D. 359; *Membery* v. *Great Western Ry. Co.*, 14 App. Ca. 179; *Smith* v. *Baker* (1891), A.C. 325.

CHAPTER IX.

OFFENCES AFFECTING THE HUMAN BODY.

§ 394A. CRIMES of violence affecting the person rise by various stages, from a mere assault up to murder. Each of these stages again ramifies into various degrees of aggravation, according to the person affected by them, and the mode and circumstances of the offence.

An assault is a threat of using criminal force to another, accompanied by a real or apparent capacity to carry out the threat at once (s. 351). A mere menace of a future injury is not an assault; but words of menace may give such a character to the gestures or preparations of the speaker, as to show an intention to use immediate violence. Conversely, the words may negative such an immediate intention, and may reduce it to a mere threat of future or contingent harm.[1] The essence of the offence is the effect reasonably produced upon the mind of the person threatened. It is not an assault to threaten another with violence, which obviously cannot be carried out, as by brandishing a stick at a distance. On the other hand, it is not necessary to show that the defendant had any intention of carrying out his threat, or even, apparently, that he had the means of carrying it out, provided the person threatened might fairly have supposed that he had the means. In one case, Parke,

[1] Explanation, s. 351; *Cama* v. *Morgan*, 1 Bom. H.C. 205.

B., said: "My idea is that it is an assault to present a pistol at all, whether loaded or unloaded. If you threw the powder out of the pan, or took the percussion cap off, and said to the party, 'This is an empty pistol,' then that would be no assault; for there the party must see that it was not possible that he should be injured. But if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."[1] Other judges have held that presenting an unloaded pistol was not an assault;[2] but, whatever the English law may be, Baron Parke's ruling seems in direct accordance with the language of s. 351. Suppose a person begins to unloose the muzzle of a ferocious dog (Illus. *b*), and terrifies a woman or a child into a fit; would it be any answer that the muzzle was locked, and that the defendant had not got the key, or had got the wrong key, or that the lock was rusty and would not answer to its key?

§ 395. Criminal force.—Force is defined with almost metaphysical subtlety by s. 349. Criminal force is defined by s. 350 as being (1) the intentional use of force to any person, (2) without that person's consent, (3) in order to the committing of any offence, or (4) with the intention to cause, or with a knowledge that he will be likely to cause, by use of such force, injury, fear, or annoyance to the person to whom the force is used.

(1) The word *intentional* excludes all involuntary, accidental, or merely negligent acts. An attendant at a bath, who, from pure carelessness, turned on the wrong tap, and thereby scalded the person in the bath (s. 350, Illus. *h*), would be liable to heavy damages, but would not have committed the offence of using criminal force.

(2) Consent in this, as in all other sections of the Code, must be taken as defined by s. 90, which has already been discussed (*ante*, § 194). There is a difference between doing an act without the consent of a person, and against his will. The latter implies mental opposition to an act which is anticipated before it takes place. If a man suddenly receives an unexpected blow, he is struck without his consent, but not against his will, which he has no opportunity of exercising. Where it is an element of an offence

[1] *Reg.* v. *St. George*, 9 C. & P. 483, at p. 490.
[2] *Blake* v. *Barnard*, 9 C. & P. 626; *Reg.* v. *James*, 1 C. & K. 530.

that the act should have been done without the consent of the person affected by it, some evidence must be offered that the act was done to him against his will or without his consent.[1] In the majority of cases this will be inferred from the character of the act.

(3) Where the force used to a person is an essential element in the offence intended to be committed, if the latter offence is only an offence by reason of the want of consent, the whole charge will fail, unless want of consent is proved. For instance, under s. 354, there can be no intention to outrage, nor probability of outraging, the modesty of a woman who consents to the act. Such consent, therefore, equally negatives the criminal force under s. 350, and the crime supposed to be intended under s. 354. Force is also an element in the crime of adultery; but there the completed act is an offence, independently of the force used. The consent of the woman would be an answer to an indictment for criminal force, but not to a charge of adultery (s. 91).

§ 396. (4) Where the use of force is not a step to the commission of another offence, mere want of consent is not enough. The act must be intended to cause injury, fear, or annoyance to the person to whom the force is used. Otherwise, a friendly squeeze of the hand, or slap upon the back would be criminal. Such an act, if done by a Pariah to a Brahman, with an intention to produce ceremonial pollution on the latter, probably would come within the section. As Baron Parke said: "The act must be of an adverse nature. A touch, in order to draw the plaintiff's attention, or in pushing through a crowd in the ordinary manner, is not sufficient."[2] This will make a considerable difference between the law of India and that of England as to indecent assaults. By English law,[3] an indecent assault on a female is a distinct offence. Any touching without consent is an assault, and, by a later statute,[4] no consent, if given by a young person under the age of thirteen, is any answer to the charge. Under Indian law, no consent given by a person under twelve years of age is of any avail (s. 90); and no doubt the principle laid down in *Reg.* v. *Lock*,[5] would also

[1] *Reg.* v. *Fletcher*, L.R. 1 C.C. 39.
[2] *Rawlings* v. *Till*, 3 M. & W. 28; *Coward* v. *Buddeley*, 4 H. & N. 481; S.C. 28 L.J. Ex. 260.
[3] 24 & 25 Vict., c. 100, s. 52.
[4] 43 & 44 Vict., c. 45, s. 2.
[5] L.R. 2 C.C. 10.

be applied, that where children had submitted to indecent treatment, being ignorant of the character of the act done, this could not be considered a consent. On the other hand, many children under the age of twelve are perfectly aware of the nature of such acts, and willing to submit to them. In such a case, although this willingness could not supply the element of consent, it would negative the idea that such an act would cause either fear or annoyance. In some cases it might undoubtedly cause physical injury. It would also negative the possibility of the act intended being a crime under s. 354. Apparently, then, it would not be an offence at all, unless the prisoner were actually trying to have sexual intercourse with a girl under ten years of age. In that case, his attempt, if successful, would be rape under s. 365, and therefore, if unsuccessful, would be punishable under s. 511. Similarly, there is no section of the Code which makes it an offence for one male to commit acts of mere indecency with another male, as in England under 48 & 49 Vict., c. 69, s. 11. Such an act, if it amounted either to attempting or abetting an offence under s. 377, would be criminally punishable. But otherwise, if consented to with full knowledge by the other party, it would be no offence at all, and the infancy of the consenting party would make no difference.

§ 397. The punishment for assault or criminal force varies by ss. 352 and 358, according as the offence is, or is not committed, under the influence of grave and sudden provocation. This is defined in the same manner as in culpable homicide, and will be fully considered under that head (*post*, § 415). Various cases in which assault and criminal violence assume aggravated forms are provided for in ss. 354—357. The only one of these which requires special notice, viz. s. 354, has been already discussed. Where a prisoner is charged with an attempt to commit a rape, but the Court is not satisfied that the accused was determined to gratify his passions at all events and in spite of all resistance, he should be convicted under that section, and not under s. 511.[1]

The fact that a result, unforeseen and incapable of being foreseen, has followed upon an assault or upon the use of criminal force, does not alter its character or the punishment due to it. For instance, where the accused gave the deceased a push, which caused him to fall, and in the fall

[1] *Reg.* v. *Shankar*, 5 Bom. 403.

he broke his toe, and subsequently died of *tetanus;* it was held that no offence but that of criminal force had been committed.[1]

§ 398. **Hurt.**—Under the above sections it is not necessary to show that any suffering or injurious consequences followed from the act done. Such cases are provided for by other sections. Hurt, and grievous hurt, are defined by ss. 319 and 320. A person is not punishable for causing hurt or grievous hurt, unless he causes it voluntarily; that is, with the intention of causing it, or with the knowledge that he is likely to cause it. A man who strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, in a manner likely to cause grievous hurt to any one on whom the blow falls, must know that he is likely to cause such hurt to the child, and is properly punished if that result follows.[2] A person who intends to cause one of the eight sorts of grievous hurt, and who causes a different one, is still punishable for causing grievous hurt (Explanation, s. 332). If a person intends to cause simple hurt, but uses means which are, and which he ought to have known were likely to cause grievous hurt, and grievous hurt follows, he will be punishable under s. 325. If nothing more than simple hurt follows, he will only be punishable under s. 323. If, however, he only intends simple hurt, and uses means which have no reasonable chance of causing anything more serious, and, in fact, grievous hurt follows—as, for instance, if he breaks the skin by a slight blow, and an attack of erysipelas ensues, which results in three weeks' illness—he is still only punishable under s. 323, as he neither intended, nor knew that he was likely, to cause anything more (Explanation, s. 322).

§ 398A. The word "voluntarily" is defined by ss. 321 and 322. It will be observed that the only thing which has to be considered under each definition is the state of the prisoner's mind at the moment the act is committed. If he then intended, or knew that he was likely, to cause grievous hurt, the suddenness of the intention will be immaterial. A voluntary act is not to be confounded with a premeditated act. In a case where a prisoner was indicted for a common assault, and also for maliciously inflicting grievous bodily harm, the jury found that he was "guilty of an

[1] *Reg.* v. *Acharjya*, 1 Mad. 224.
[2] *Reg.* v. *Sahae Rae*, 3 Cal. 623.

aggravated assault, but without premeditation, and that it was done under the influence of passion." The Court held that this was a sufficient verdict of guilty upon the more serious charge. They said: "We think this assault was intentional in the understanding of the law, though committed without premeditation and under the influence of passion."[1]

Where an act, which would be culpable homicide were death to ensue, only causes grievous hurt, the offender will always be punishable under this section. Because, in order to come under s. 299 the criminal must have known that he was likely to cause death, and any injury which is likely to cause death is grievous hurt (s. 320, cl. 8); therefore, he must not only have caused grievous hurt, but known that he was likely to cause it. But the converse does not follow; and if a person intending to cause grievous hurt actually causes death, it is not necessary that he should be guilty of culpable homicide, because many species of grievous hurt are not likely to cause death. If, therefore, it could be shown that the offender intended merely to break a finger and did break it, but an attack of heart disease was brought on, of which the sufferer died, here the knowledge necessary to constitute culpable homicide would be wanting, and a conviction could only be had under s. 325.[2] And similarly, if the act was only intended and likely to cause hurt, but from some unforeseen cause is followed by death, the accused can only be punished under s. 323.[3]

These offences again are subject to a mitigated punishment by ss. 334 and 335, where the hurt, or grievous hurt, was caused on grave and sudden provocation, if the offender neither intends nor knows himself to be likely to cause such hurt to any person other than the person who gave the provocation. The meaning of this, of course, is, that if a person who has received provocation assails the person who has given the provocation, he is only liable to a light punishment. But if, while out of temper in consequence of the provocation, he were to attack an innocent person, or to run *amuck* generally, like a Malay, the previous provocation would be no excuse. I should not have thought it necessary to point this out, but that a case occurs in which

[1] *R.* v. *Sparrow*, Bell, 298; S.C. 30 L.J. M.C. 43.
[2] *Reg.* v. *O'Brien*, 2 All. 766; *Reg.* v. *Idu Beg*, 3 All. 776.
[3] *Reg.* v. *Fox*, 2 All. 522, where Straight, J., gives a summary of the celebrated *Fuller* case; *Reg.* v. *Randhir Singh*, 3 All. 597.

draft Code of 1879, lay down the law as follows, in accordance with the authorities cited below. "A child becomes a human being within the meaning of this Act, when it has completely proceeded in a living state from the body of its mother,[1] whether it has breathed or not,[2] and whether it has an independent circulation or not,[3] and whether the navel string is severed or not;[4] and the killing of such child is homicide, when it dies after birth in consequence of injuries received before, during, or after birth."[5]

§ 401. What amounts to the killing of a newly born infant under the Code, has to be collected from two unconnected sections. By Explanation 3 of s. 299, "the causing the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born." By s. 315, "Whoever, before the birth of any child, does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by that act prevent the child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished," etc. It seems to me that these sections were intended to produce a state of law different from that which prevails in England, in two respects: 1. That no act done before the birth of a child can be culpable homicide, though the child is subsequently born alive, and dies afterwards from the effects of the injuries received while in the womb. Such an offence appears to be only punishable under s. 315. 2. That when any part of an existing child has once made its appearance in the world, it may be culpable homicide to do it an injury with the intention of terminating its existence. The word "may," I suppose, was inserted to meet the case, specifically stated in s. 315, when it is necessary to sacrifice the child to save the mother. The result would be, that no case could be culpable homicide, where the child was injured

[1] *Reg.* v. *Poulton*, 5 C. & P. 329.

[2] *Reg.* v. *Brain*, 6 C. & P. 349.

[3] This seems contrary to *Reg.* v. *Enock*, 5 C. & P. 539; *Reg.* v. *Trilloe*, C. & Marsh, 650; *Reg.* v. *Wright*, 9 C. & P. 754.

[4] *Reg.* v. *Trilloe*, C. & Marsh, 650.

[5] *Reg.* v. *West*, 2 C. & K. 784. The whole subject is discussed in Taylor's Medical Jurisprudence, chaps. 75—79.

through its mother, or by any direct injury to itself before it had left the womb, wholly or in part. But that when it had once reached that stage, any deliberate injury might be culpable homicide, if it was done with the intention of preventing the complete birth of a living child, or of causing the death of such a child, if completely born alive. No doubt this view, if correct, would get rid of many of the difficulties which arise under English law.

§ 402. **Causing Death.**—Any act is said to cause death, when the death results either from the act itself, or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result. As if a man were to lay poison in the food or medicine which another was likely to take, or were to induce him to enter a room with a dangerous lunatic or a savage animal.[1] So where a woman left her infant in an orchard, covered only with leaves, in which condition it was killed by a kite; or hid it in a hogstye, where it was devoured.[2] And where death results from a series of wrongful acts, constituting a systematic course of ill-treatment, the death is properly said to be caused by the ill-treatment, though no one of the acts, taken by itself, would have been fatal to life. But where this treatment has been pursued by a succession of persons, not acting in unison with each other, each is only answerable for the result of his own misconduct.[3] As regards death from causes operating upon the mind, Lord Hale says: "If a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease whereof he dies, this may be murder or manslaughter in the sight of God, but not in *foro humano*, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God."[4] So far as this statement is still law, it would probably rest upon the ground that the result was too remote and unlikely to be treated as the natural effect of the cause. Lord Denman held that frightening a child to death was manslaughter, but said that, in the case of a grown-up person, murder could not be committed by using

[1] 1 East, P.C. 228. [2] 1 East, P.C. 225; 1 Hawk. P.C. 92.
[3] Section 37 and illustrations; *R.* v. *Huggins*, 2 Ld. Raym. 1574; *ante*, § 13.
[4] 1 Hale, P.C. 429.

language so strong and so violent as to cause that person to die.[1] The English Draft Code, s. 167, makes it culpable homicide to cause death by wilfully frightening a child or sick person. And so Sir James Stephen says, in the note to his Digest of Criminal Law, art. 221, "Suppose a man kills a sick person intentionally, by making a loud noise which wakes him, when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room, and roars into his ear, 'Your wife is dead!' intending to kill, and killing him, why are not these acts murder?" The latter case was put by the original framers of the Code, and unhesitatingly held to be murder,[2] and their reasoning was assented to by the Indian Law Commissioners, in their first Report of 1846 (s. 246).

§ 403. **Illegal Omissions.**—Section 299 only speaks of acts done; but by s. 32, words which refer to acts done are extended to illegal omissions, unless the contrary appears from the context. The Code, as originally drawn (s. 294), included in the definition of culpable homicide the case of a person who "omits what he is legally bound to do." As illustrations, were given the cases of a hired guide who deserted a traveller in a jungle, where he dies; of a person legally bound to supply food to the mother of a suckling child who omits to do so, knowing that the mother's death may result, and the mother survives, but the child dies; and of a person who keeps another in wrongful confinement, and, being in consequence bound to supply him with everything necessary for his life, omits to procure medical advice for him, knowing that he is likely to die for want of it. In commenting upon this section, the Commissioners give the following as further instances of their meaning:—

"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death; this is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder, if A is a guide who has contracted to conduct Z. It is not murder, if A is a person on whom Z has no other claim than that of humanity."

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper

[1] *Reg.* v. *Towers*, 12 Cox, 530. [2] Appendix, note M., p. 142.

order with the dog is illegal (s. 289). But if A be a mere passer-by, it is not murder."[1]

An illegal omission is an omission to do anything which a person is legally bound to do. But every illegal omission could not be charged as an act causing death. It is illegal not to pay a debt; but if a man were to die of starvation because he was not paid money due to him, his debtor could not be charged with having caused his death. The relation of cause and effect would be too remote. Nor, again, is an omission illegal, even though the death of another may obviously follow, if the act omitted is one which charity or humanity would dictate, but which is not an obligation imposed by law. It may be inhuman, but is certainly not illegal, to allow a beggar to starve, or a sick man to die for want of medical aid. "Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life. They are as follow: A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life."[2] Accordingly, where death is caused by neglect to supply the proper necessaries of life to prisoners, to children, or to apprentices, the offence would be culpable homicide; but a parent is under no legal obligation to procure the aid of a midwife for his daughter when in childbirth, and is not criminally liable if the daughter dies in consequence.[3] And so, where a mistress was indicted for causing the death of her servant, by neglecting to supply her with proper food and lodging, Erle, C.J., said: "The law is clearly, that if a person has the custody and charge of another, and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody. But it is also equally clear that when a person, having the free control of her actions, and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for

[1] Report, 1837, p. 140. [2] 3 Steph. Crim. L. 10.

[3] *Reg.* v. *Shephard*, 31 L.J. M.C. 102; S.C. L. & C. 145; 1 Hawk. P.C. 93, n. As to gaolers, see Foster, Crim. L. 321; I.P.C., s. 37, illus. (*b*), (*c*).

any consequences that may ensue. The question in the present case is, whether there is evidence that the deceased was reduced to such a state of body and mind as to be helpless, and unable to take care of herself, or that she was so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control. If there was substantial evidence to go to the jury upon either of these points, the conviction must, of course, be sustained."[1]

§ 404. This was the ground of decision in the following case. The prisoner, a woman of mature age, lived with and was maintained by the deceased, who was aged 73. No one lived with them. All supplies were purchased by the prisoner with the money of the deceased, which passed through the hands of the accused. For the last ten days of her life the deceased suffered from gangrene of the leg, which prevented her from moving, or doing anything for herself. During this time the prisoner took in the usual supplies of food, but apparently gave none to the deceased. She procured for her no medical or nursing attendance, and gave no information of her condition to the neighbours or relations of the dying woman. It was found as a fact that the death of the deceased was accelerated by want of food, medical advice, and proper nursing. The prisoner was convicted of manslaughter, on the ground that the helpless condition of the deceased rendered her absolutely dependent on the prisoner, and that the possession by the latter of funds, which she was bound to apply for the benefit of their owner, rendered her criminally responsible for the death.[2] Such a case under the Penal Code would certainly be culpable homicide, if not murder. A contrary decision was given under the following circumstances. A servant girl, who was about to give birth to a child, concealed the fact from every one about her, and deliberately abstained from taking any of the precautions necessary to preserve the life of the child after its birth. It was found as a fact that the child died in consequence. There was no reason to suppose that the mother was actuated by any other motive than that of keeping up to the last the deception as to her condition. Cockburn, C.J., after consulting with Williams, J., directed the jury that upon these facts the woman could not be convicted of manslaughter.[3] It is obvious that she

[1] *Reg.* v. *Smith*, L. & C. 607, 624; S.C. 34 L.J. M.C. 153.
[2] *Reg.* v. *Instan* (1893), 1 Q.B. 450.
[3] *Reg.* v. *Knights*, 2 F. & F. 46.

had no legal duty to the child till it was born alive, and after its birth it does not appear that she neglected anything which she could have done. She was convicted under an English statute, nearly in the same terms as s. 318 of the Penal Code.

§ 405. Where there has been an omission of a clear legal duty, it is still necessary to show that the death was absolutely traceable to it, or accelerated by it. If a parent, being able to supply medical aid to his infant child, refuses or neglects to do so, and the child dies, the parent is not guilty of culpable homicide, unless it can be shown that the child's life would have been saved or prolonged if medical aid had been supplied. Several cases of this sort have arisen in England, with a sect called the Peculiar People, whose religion forbids them to interfere with the ways of Providence by calling in human assistance in case of illness.[1]

Under ss. 490—492, breaches of contract, or illegal omissions, are punishable, whether any injury follows from the omission or not.

§ 406. Under English law, even where the deceased has voluntarily done the act which caused his death, it will still be culpable homicide if it was done from an apprehension of immediate violence. As, for instance, where, on being attacked, he threw himself into a river, or jumped out of a window, provided the apprehension was well grounded and justified by the circumstances.[2] The principle was, that a person who is attacked has a right to make his escape by every possible means; and if his death happens from the means to which he is driven, the person by whose unlawful act he is compelled to such extremity is responsible for the consequence. Under s. 299 the above class of cases seems to be excluded. That section appears to assume that the death is caused by the act of the accused, and by an act which he intended, or knew to be likely, to cause death. This can hardly, without great straining, be said of a death which results entirely from the voluntary and unforeseen act of the deceased himself, and which would never have happened from any act done or intended to be done by the prisoner.

407. Explanation 1 of s. 299 recognizes the rule of

[1] *Reg.* v. *Morley*, 8 Q.B.D. 571.
[2] *Reg.* v. *Pitts*, C. & M. 284.

common law[1] that even if a person is actually dying, any injury which accelerates the death is deemed to be the cause of it; and it makes no difference that the act which shortens life is done from motives of the purest humanity, as, for instance, to release a dying man from intolerable suffering. But if such an act was done with the consent of a person above eighteen, it would still be murder by English law, but under the Code it would be culpable homicide not amounting to murder.[2]

§ 408. Where an injury of a dangerous character has been inflicted, which might possibly not have been fatal, but the sufferer declines to follow proper treatment, or is injudiciously treated, or sinks under an operation, which might possibly have been avoided, the person who inflicted the injury is considered in law to have caused the death which results. Any one who puts the life of another in danger is responsible for the result. "If a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of death, yet this is murder or manslaughter in him that gave the stroke or wound, though it were not the immediate cause of his death; yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causans*."[3] This is substantially the same as the rule laid down in Explanation 2, s. 299. Accordingly, where a man received a cut upon the finger, and the surgeon urged him to allow it to be amputated, and he refused, and then lock-jaw set in, of which he died, evidence was offered that if he had submitted to the operation his life would probably have been saved. Maule, J. held that this was no defence. The real question was whether in the end the wound was the cause of death.[4] In another case an operation had been performed, under which the patient had sunk. Erle, J., refused to receive evidence to show that no operation was necessary, or that an easier and much less dangerous operation might have been performed. He said, "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and

[1] 1 Hale, P.C. 428.
[2] 1 East, P.C. 228; Exception 5, s. 300.
[3] 1 Hale, P.C. 428.
[4] *Reg.* v. *Holland*, 2 M. & Rob. 351.

the treatment which they *bonâ fide* adopt is the immediate cause of death, the person who inflicted the wound is criminally responsible."[1] Where, however, the wound would not have caused death, but is brought on by improper applications—that is to say, not merely by applications which turn out not to have been the most judicious that might have been employed, but by applications ignorantly administered by unqualified persons—this, according to English law, was considered not to be murder, for the death started from a completely different source, and was not the result of the act done.[2] The original framers of the Code, however, considered that the question of murder or no murder would turn, not upon the cause of the death, but the object of the wound, and gave the instance of a person interested in the death of a young heir giving him a slight wound, knowing that the ignorant and unskilful treatment of those around him would cause it to terminate fatally, and intending such a result.[3] The subsequent Commissioners agreed with them that such a case, if it could be proved, ought to be treated as murder, and that it would come under the definition of the offence. They considered the case, however, so improbable, that they expressed themselves as "doubtful of the propriety of putting it as a case within the definition (s. 299), for fear of its leading to a latitude of construction which, under some supposed analogy, might include predicaments quite beyond its scope."[4]

The rule of the English common law, that a man who had received an injury from another was not considered to have been killed by him, unless the death followed within a year and a day after the injury,[5] was probably a rough way of cutting short difficult questions as to whether the injury was the immediate, or only the remote cause of death. No such rule is laid down in the Code.

§ 409. **Intention or Knowledge.**—Where death has been caused under such circumstances that it can be called homicide, it will be murder, or culpable homicide not amounting to murder, according to the intention or knowledge with which the act causing the death was done. Murder must always be culpable homicide, but not *vice versâ*. The difference between them will be best shown by placing ss 299 and 300 in parallel columns.

[1] *Reg.* v. *Pym*, 1 Cox, 339. [2] 1 Hale, P.C. 428.
M.. p. 143. [4] 1st Report, 1846, s. 251, p. 24

299. (1) Whoever causes death by doing an act with the intention of causing death, or

(2) With the intention of causing such bodily injury as is likely to cause death, or

(3) With the knowledge that he is likely by such act to cause death,

commits the offence of culpable homicide.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly.—If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, or

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

These distinctions were very fully discussed by Sir Barnes Peacock in a Bengal case,[1] where he said: "Culpable homicide is not murder, if the case falls within any of the exceptions mentioned in s. 300. The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in s. 300. Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, in my opinion falls within the words of s. 299, 'with the intention of causing such bodily injury as is likely to

[1] *Reg.* v. *Gora Chand Gope*, B.L.R., Sup. Vol., 443; S.C. 5 Suth. Cr. 45.

cause death,' and is culpable homicide. It is also murder, unless the case falls within one of the exceptions. See s. 300, cl. 3.

"Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in s. 300, unless it falls within cls. 2, 3, or 4 of s. 300; that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death.

"In speaking of acts, I, of course, include illegal omissions.

"There are many cases falling within the words of s. 299, 'or with the knowledge that he is likely by such act to cause death,' that do not fall within the 2nd, 3rd, or 4th clauses of s. 300; such, for instance, as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act of illegal omission is likely to cause death, and if, in fact, it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must, in all probability, cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death, or such bodily injury as is described in cls. 2 or 3 of s. 300.

"As an illustration: suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously, along a narrow, crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one, or to cause bodily injury to any one. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury, etc., as to bring the case within he 4th clause of s. 309. In an ordinary cause of

furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for ten years, or imprisonment for ten years with fine (see ss. 304 & 59); or, if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder, if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, etc., as in cl. 4, s. 300.[1]

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

"Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose that it should be proved that he had business in a distant part of the country, say at the opposite terminus, that he was intending to go by a particular train, and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death, would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing death was such

[1] See, as to cases of this sort, 1 East, P.C. 231.

that he must have known, and did know, that his act must, in all probability, cause death, etc., within the meaning of cl. 4, s. 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder and liable to capital punishment."[1]

§ 410. From this review it appears, that, putting aside cases which come under the exceptions to s. 300, culpable homicide must always be murder unless the facts can be brought strictly within cl. 3 of s. 299. It must be found that the accused had actual knowledge that he was likely to cause death, or his case will not come within s. 299. It must be clear that he had not a distinct intention to kill or to cause vital injury, or a distinct knowledge that his act would in all probability have such a result, or his case will come within s. 300.[2] A common type of cases coming within cl. 3 of s. 299 is that of those brutal assaults, made without any deadly weapon, but with a violence likely to endanger life, which do in fact end fatally.[3] Another type is that of dangerous acts, done with the knowledge that they do endanger life, but with no hostile intention, and with the belief that the danger will be escaped or warded off. Such was the case of the snake-charmer, who, to show his own skill and dexterity, placed a poisonous snake on the head of one of his spectators. The boy, not displaying a proper degree of confidence, pushed the snake away, and was bitten and died.[4] Where, however, from some unknown and unforeseen cause death happens from an unlawful act, which was likely to cause hurt, or grievous hurt, but which was not likely to cause death, the offence will not be culpable homicide, but only the particular offence which was intended, and in the ordinary course of nature would have been committed.[5] Frequently such offences will be committed where there is gross negligence in the management of dangerous things, or gross neglect of duty where human safety is concerned. A person in charge of an engine who entrusts its management to a boy, incapable and known by him to be incapable of managing it;[6] a banksman at a mine, who omits the pre-

[1] See, to the same effect, *per* Melvill, J., *Reg.* v. *Govinda*, 1 Bom. 342.
[2] *Reg.* v. *Girdharee*, 6 N.W.P. 26.
[3] *Reg.* v. *Govinda*, 1 Bom. 342.
[4] *Reg.* v. *Gonesh Dooley*, 5 Cal. 351.
[5] *Reg.* v. *Panchanan*, 5 Suth. Cr. 97; *ante*, § 398.

caution necessary to prevent the trucks running down the shaft;[1] the owner of a field through which there is a public path, who allows a savage bull to be at large in the field,[2] would severally be guilty of culpable homicide if death occurred. Many of the cases where railway accidents, resulting in loss of life, occur from neglect of duty or carelessness in drivers, pointsmen,or signalmen, which in England are punishable as manslaughter, would in India be punishable under s. 304A. A driver who deliberately past a danger signal would in general have committed culpable homicide if a fatal accident followed. So would a signalman or a pointsman who left his post when a train was likely to pass. But if the driver through carelessness did not see the signal; or if the pointsman or signalman left his post in violation of express general orders, at a time when no train ought to have been on its way, and during his absence a train which no one could have anticipated arrived, it would probably be impossible to establish the knowledge that death was likely to occur, without which there could not be a conviction under cl. 3 of s. 290. As to cases in which deaths have arisen from slight injuries caused to persons with enlarged spleen,see *ante*, § 398, and *post*, § 434.

§ 411. The instructions of a superior officer cannot justify an inferior in doing an act, which is so plainly and necessarily dangerous to life as to be upon its face illegal (*ante*, § 95). But in matters such as the management of trains, where the danger or safety of an act depends on a number of circumstances, many of which must be unknown to the person acting, the fact that he is obeying superior orders is very material as showing that he had no reason to believe that his conduct was dangerous. The engine-driver and fireman of a train were indicted for manslaughter arising out of a collision. According to the general rules a red flag showed that the train must stop instantly. On Ascot race day, when an unusual number of trains were running, special instructions were issued that the red signal should not mean "Stop," but only "Danger," and that the engine should proceed with caution. On approaching Egham the red signal was exhibited; the defendants whose train did not stop there, went at slackened speed through the station. Almost immediately after they came into collision with a train which had preceded them by five minutes, and had stopped at Egham.

[1] *Reg.* v. *Hughes*, D. & B. 248; S.C. 26 L.J. M.C. 202.
[2] 1 East, P.C. 264.

The defendants did not know that it would do so, and if it had not stopped there would have been no collision. Willes, J., directed the jury that their duty was to obey the special instructions issued to them as well as they could, presuming there was no apparent illegality in them; and in that case, provided they put the best construction they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. As for the fireman, there was no case at all against him. He was bound by general rules to obey the engine-driver, and had nothing to with the management of the train.[1]

§ 412. Where an action is brought for damages arising from a negligent or wrongful act, it is a sufficient answer that the complainant contributed to the harm by his own negligence, without which he would not have suffered from the wrongful act of the defendant.[2] But contributory negligence is no answer to a criminal charge.[3] The reason for the difference is, that in a civil action the claim is for damages arising from the wrongful act of the defendant, to which it is a sufficient answer, subject to certain limitations which need not be discussed here, that the plaintiff had no one to blame but himself. A criminal proceeding is founded on the injury to the public from the culpable negligence of the accused, and this is not lessened, though the punishment may be affected, by the fact that the injured person was also in fault.

§ 413. **Burthen of Proof.**—In England, as soon as the fact of killing was proved against the prisoner, the law assumed such malice as made the killing murder, and it lay upon the defence to prove facts which would extenuate the charge, unless such facts were apparent on the case for the prosecution.[4] In India, however, killing is often not enough to constitute culpable homicide. The prosecution must make out, either by direct evidence, or by inference from the facts of the case, that the accused had direct knowledge or intention as is required by ss. 299 or 300. These are questions of fact. If such knowledge or intention as makes out an

[1] *Reg.* v. *Trainer*, 4 F. & F. 105, p. 112.

[2] *Radley* v. *London and North-Western Ry. Co.*, 1 App. Ca. 754, p. 759.

[3] *Per* Pollock, C.B., *Reg.* v. *Swindall*, 2 C. & K. 230; *per* Rolfe, B., *Reg.* v. *Longbottom*, 3 Cox, 439; *per* Lush, J., *Reg.* v. *Jones*, 11 Cox, 544, where he refused to follow a contrary opinion attributed to Willes, J., in *Reg.* v. *Birchall*, 4 F. & F. 1087; 6 Mad. H.C. Rulings, p. 33.

[4] 1 Hawk. P.C. 98; Foster, Crim. L. 253, 290.

offence within the terms of ss. 299 or 300 is found by the court, or appears upon the face of the evidence, and is not disputed, the inference that the crime so defined has been committed is a matter of law. If the court upon these facts finds the prisoner guilty of a lesser offence, his sentence may be set aside on revision. But the sentence cannot be so set aside if the necessary ingredients to the offence have been expressly negatived, or if the court, by finding the prisoner guilty of culpable homicide only, has impliedly negatived the special knowledge or intention which would raise the offence to murder, there being no other finding which contradicts this implied negative.[1] The mere finding that there was no intention to cause death is not sufficient to reduce a charge below murder, if the facts found bring the case within cls. 2, 3 or 4 of s. 300.[2]

§ 414.—In Bombay this curious case occurred.[3] The prisoner struck his father-in-law three blows with a stick on the head, intending to kill him and believing he had killed him. He then set fire to the hut in which the man lay senseless, intending apparently to get rid of the evidence of his guilt, or to make the death appear to be accidental. It was proved that the man died not of the blows but of the fire. The result was that the prisoner intended to kill him, but did not kill him, and then did kill him without intending to kill him, because he supposed he had killed him already. Upon these facts the High Court set aside the conviction for murder, but found the prisoner guilty of attempting to murder under s. 307. If he had cut the man's head off, and thrown it away to prevent the corpse being identified, apparently the same decision would have been given. The prisoner would have had a very clear defence if the intended murder had been committed by some one else, and if he had burnt the supposed corpse to screen the supposed murderer. But if a man intending to kill another does two successive acts, the latter of which must necessarily kill him, can he be held free from the guilt of murder because it was effected by the second act instead of the first, and because the second act was intended for a purpose subsidiary to the first? He intended to murder the man,

[1] *Reg.* v. *Soumber Gwala*, 4 Suth. Cr. 32; *Reg.* v. *Sheikh Choollye*, 4 Suth. Cr. 35; *Reg.* v. *Toyab Sheikh*, 5 Suth. Cr. 2; *Reg.* v. *Gora Chand Gope*, 5 Suth. Cr. 45; *Reg.* v. *Sheikh Bazu*, 8 Suth. Cr. 47.

[2] *Reg.* v. *Pooshoo*, 4 Suth. Cr. 33.

[3] *Reg.* v. *Khandu Valad*, 15 Bom. 194.

and he did murder him, and by an act which must necessarily have murdered him, if he had not been murdered already.

§ 415. **Exceptions.**—A person who causes death with a knowledge that can only be brought within the last clause of s. 299, or in a manner which falls within any of the four clauses of s. 300, but which also comes within any of the exceptions to that section, is said to commit culpable homicide not amounting to murder. In the latter case, the prosecution must prove facts which bring the accused within the clauses of the section. The accused must prove all facts necessary to bring him within the exceptions. This was always the law in England,[1] and is expressly laid down by the Indian Evidence Act, I. of 1872. s. 105, and by the Crim. P.C., 1882, s. 221, illus. (*a*) (*b*).[2]

Provocation.—The most important of these exceptions is the first, which relates to provocation. "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident." These terms are apparently intended to embody the general principles laid down by the English judges, that the provocation must be adequate, that the violence used must be in proportion to the provocation, and that the act causing death must be done while the want of self-control caused by the provocation continues.

According to the law of England, provocation by words or gestures alone cannot be sufficient to reduce the crime of killing intentionally, or with a deadly weapon, below that of murder.[3] Upon this point, however, the framers of the Code say, "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart."

[1] Foster, Crim. L. 255, 290. [2] *Re Shibo Prosad*, 4 Cal. 124.
[3] Foster, Crim. L. 290.

Accordingly, they draw special attention to the fact, that under these sections words and gestures are put upon the same footing as any other provocation.[1]

The later Commissioners assent to this reasoning, remarking, that, "A discreet judge would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shown to belong to a class sensitive to insults of this sort or otherwise."[2]

§ 416. What the Code requires is that the provocation should be grave and sudden, and such as may be considered reasonably capable of depriving of his self-control the man who receives it. "To give an accused person the benefit of Exception 1, it ought to be shown distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause. It is clear that the prisoner was not taken unawares, but had some expectation of what was likely to happen, and had placed his sword in readiness for the emergency."[3] In a Madras case, the deceased came up in the middle of an altercation which had already been going on between the prisoners and the son of the deceased. The High Court, setting aside a conviction for murder, said of the vocation, which, as far as it originated from the eased, had been merely abuse: "What is required is that it should be of a character to deprive the offender of his self-control; in determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In present case the abusive language used was of the lowest kind, and was addressed to a man already justly enraged by the conduct of the deceased's son."[4] A common source of provocation in this country is jealousy. It has always been recognized that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour. Mere suspicion is not sufficient. A man had well-founded reason for supposing that his wife had formed a criminal intimacy with one Fakruddin. One night she left his side stealthily. He took up an axe, followed her, and found her in a public place, talking to

[1] Appendix, Note M. 145. [2] 1st Report, 1846, s. 271, p. 254.
[3] *Reg.* v. *Hari Giri*, 1 B.L.R. A. Cr. 11; S.C. 10 Suth. Cr. 26.
[4] *Reg.* v. *Khogayi*, 2 Mad. 122.

Fakruddin. He immediately killed her with the axe. The act was held to be murder. The Court ruled that so far as the facts raised a suspicion of infidelity, such a suspicion was not a sufficient provocation in law; following the language of Rolfe, B., where he said: "I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder."[1] As regards the impropriety of the woman's conduct in meeting the man—that, no doubt, was very great; but the meeting took place in a public place, and under circumstances which, while they might arouse the anger of the accused, could not be properly held to have deprived him of self-control to the extent and degree required by law.[2] Where, however, a man had actually witnessed criminality between his wife and her paramour in the evening, and the next morning found his wife eating with him, and giving him food in her house, whereupon the husband seized a bill-hook and killed him, this was held to be sufficient provocation within the meaning of Exception 1. Such conduct, coupled with what he had previously seen, implied that all concealment of their criminal relations, and all regard to his feelings were abandoned, and that they purposed continuing their course of misconduct in his house.[3] All this agrees exactly with the language of the English law. "It must not, however, be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter. For, where the punishment for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty; it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. 'Barbarity,' says Lord Holt, 'will often make malice.'"[4]

§ 417. It is not enough to show that there was a sufficient provocation, and that the act which caused death was committed in consequence of the provocation. It must be

[1] *Reg.* v. *Kelly*, 2 C. & K. 814. [2] *Reg.* v. *Mohun*, 8 All. 622.
[3] *Boya Munigadu* v. *Reg.*, 3 Mad. 33. [4] 1 East, P.C. 234.

shown that the provocation destroyed self-control, and that the killing took place while that absence of self-control lasted, and may be fairly attributed to it. Killing a man who is found in the act of adultery by the husband is culpable homicide not amounting to murder; "but had he killed the paramour deliberately and upon revenge after the fact, and sufficient cooling time, it had been undoubtedly murder."[1] In the case of *Reg.* v. *Mahun*, already stated (*ante*, § 416), the plea of provocation would have failed on this ground, even if the provocation had been adequate. Following the woman in cold blood with an axe showed a deliberate determination to kill her by way of revenge for any infidelity which she might be about to commit. Even if she had been found in the act, and then killed, it would have been impossible to ascribe the act to any thing but a settled plan of vengeance, carried out as soon as the expected provocation furnished an occasion for it. So it will be where sufficient time has elapsed to allow the blood to cool, and where the killing arises from the hostile spirit aroused by the provocation, and not from any want of self-control to restrain it. Two gentleman had a quarrel at a tavern, and threw bottles at each other's heads. They drew their swords, and if one had then killed the other it would have been only manslaughter. The company interposed. They sat quietly together for about an hour, and when they were about to separate, the deceased offered his hand to the prisoner, who refused it with an oath, and said he would have his blood. When the deceased was going out with the others, the prisoner called him back. They fought in the same room, without witnesses, and the deceased was killed. This was held to be murder.[2]

§ 418. Exception 1 is further subject to three provisoes. "*First.* That the provocation is not sought, or voluntarily provoked, by the offender, as an excuse for killing or doing harm to any person." This seems necessarily involved in the language of the exception itself. If a person by word or act provokes another to strike him in order that he may have a colourable pretext for killing him, the subsequent killing must be ascribed to the state of mind existing before the blow, not to that which followed upon it.[3] In a

[1] Foster, Crim. L. 296; *Reg.* v. *Yasin Sheikh*, 4 B.L.R. A. Cr. 6; S.C. 10 Suth. Cr. 68.

[2] *Major Oneby's* case, 2 Ld. Raym. 1485; 1 East, P.C. 253; see *per* Tindal, C.J., *Reg.* v. *Hayward*, 6 C. & P. 157.

[3] Hale, P.C. 457; 1 Hawk. P.C. 96.

case from Allahabad, the deceased, who was a widow of a cousin, living in the prisoner's house, went out at night to meet her paramour. The prisoner, evidently suspecting her purpose, armed himself with a chopper, and followed her. He found her in the act of connection with her paramour, and killed her with the chopper. He was convicted of culpable homicide not amounting to murder, and this sentence was changed by the High Court on revision to one of murder. Straight, Officiating C.J., considered that, as the prisoner was not the woman's husband, the fact itself constituted no sufficient provocation. But further, "He neither called to her to come back, nor remonstrated with her, nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence."[1]

§ 419. "*Secondly.* That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant." It will be observed how different this proviso is from s. 99. In the latter the right of private defence is excluded as against the acts of a public servant, though not strictly justifiable by law. Under the proviso, his acts may furnish provocation unless they are strictly lawful. Accordingly, where a soldier was convicted of murder, for killing a sergeant who had arrested him for some misdemeanour, and no evidence was offered to show that the sergeant had any authority to arrest him, it was held by all the judges that the provocation reduced the offence to manslaughter.[2] And so the Commissioners say:[3] "We apprehend that grave provocation given by anything done under *cover* of obedience to law, or under *cover* of its authority, or by a public servant, or in defence, in *excess* of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them and the like, would be admissible in extenuation of homicide under this clause. For example, take the case of *Wat Tyler* referred to in the note to this chapter.[4] Here was a public officer, a tax-gatherer, who came 'to exercise his lawful powers' in that capacity, but doing so in a manner unwarranted and highly offensive.

[1] *Reg.* v. *Lochan*, 8 All. 635.

[2] *Wither's* case, 1 East, P.C. 295. See this subject discussed, *ante*, §§ 207—214.

[3] 1st Report, 1846, s. 277, p. 256. [4] Appendix M., p. 144.

Tyler was excited to 'violent passion,' and in his rage killed him on the spot. The Commissioners upon this say, 'so far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter.'"

"*Thirdly.* That the provocation is not given by anything done in the lawful exercise of the right of private defence." The framers of this proviso seem to have overlooked the fact, that two persons may each be exercising the right of private defence against the other. In the illustration (*b*) to s. 98, L is lawfully exercising his right of private defence against A, because he takes him for a housebreaker; and A is lawfully exercising the same right against L, because he is attacked when he is not a housebreaker. Practically the oversight is not likely to lead to any confusion.

§ 420. It is not clear what is meant by the Explanation at the end of Exception 1, which states that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. The law upon the point is laid down by Foster[1] as follows: "In every case where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating; the matter of fact, viz. *whether the facts alleged by way of justification, excuse, or alleviation are true,* is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the Court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this as in all other cases undoubtedly the proper province of the Court. In cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the Court *in point of law,* matters of fact being still left to their determination, may, and, if they are well advised, always will find a general verdict, conformably to such direction. *Ad quæstionem juris non respondeant juratores.*" It is probable that the Explanation means nothing different from this. There can be no doubt that it is a pure question of law whether, the facts being found, a prisoner is justified

[1] Crown Law, 255.

or excused under the chapter of General Exceptions, and there seems no reason why the question whether his guilt is alleviated under Exception 1 should follow a different rule. Possibly it may mean that the question, whether the provocation had deprived him of self-control, was a pure question of fact, which no doubt it is. The importance of a right understanding upon this point will be generally felt where the case comes before the High Court by way of revision. In a Bengal case,[1] Glover, J., while clearly of opinion that no provocation had been made out upon the facts of the case, considered that provocation was a question of fact, and that as the judge and assessors had found on the evidence that the prisoner was not guilty of murder, the High Court could not interfere, no question of law being involved. In an exactly similar case,[2] the High Court of Allahabad treated the sufficiency of the facts found to constitute grave and sudden provocation as a mere question of law, and altered the conviction to one of murder.

§ 421. **Self-defence.**—Exception 2 reduces below murder all cases in which death has been caused by an excessive use of the right of self-defence, provided the act has been done in good faith, without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Considering the number and difficulty of the questions which arise in regard to the right and the limits of self-defence, this Exception is most important.

Act of Public Servant.—Exception 3 contains a similar provision for the protection of public servants and those who aid them, when acting for the advancement of public justice, when they exceed the power given them by law, and cause death by doing an act, believed in good faith to be lawful and necessary for the due discharge of their duty as such public servant, and without ill-will towards the person whose death is caused. For instance, a reward had been offered for the capture of an outlawed murderer. Some village servants, who believed that they would be punished if they did not effect his capture, tracked him down, and at once killed him. They made no effort to take him alive, as they apparently could have done. This act was held to come within the Exception, and so to be only culpable homicide not amounting to murder.[3] On the other hand, the

[1] *Reg.* v. *Hari Giri*, 1 B.L.R. A. Cr. 11; S.C. 10 Suth. Cr. 26.
[2] *Reg.* v. *Lochan*, 8 All. 635. [3] *Reg.* v. *Aman*, 5 N.W.P. 130.

Exception does not apply where a public servant, employed in a public duty, does an act wholly outside such duty, in order to carry out some private purpose of his own. A head-constable engaged in investigating a case of theft proceeded to search the tents of some gipsies. Finding nothing he proceeded to extort money from them, and to effect his object unlawfully ordered some of the gipsies to be bound and carried away. This led to a disturbance and threats of violence by the gipsies, upon which the head-constable fired a gun into the crowd, and killed one of them. It was held that he was guilty of murder. The Court said: "Himself having provoked the action of the gipsies by his illegal and improper procedure, the respondent stands in no better and no worse position than any private person, and is not entitled to the superior protection which is thrown around a public servant lawfully acting in the discharge of his duty. It does not appear to us that any question of self-defence arises, for upon the facts it is clear that any apprehension of death or grievous hurt which the respondent might have had, could have at once been determined by the release of Hardeva, the abandonment of his demand for Rs. 5, and the withdrawal of himself and his companions from the spot."[1]

§ 422. **Sudden Fight.**—*Exception* 4. "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage, or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault."

This Exception seems exactly to reproduce the English law in respect of death arising upon sudden quarrels. The quarrel and the fight must be so far continuous, that the latter takes place while the heat of passion engendered by the former still continues, and this may be even although such an interval elapses as is required for obtaining weapons.[2] Such a case, however, could hardly happen except where the persons concerned had weapons at hand, as every one had until comparatively recent times. Nor is a quarrel sufficient, where it appears from the whole circumstances of the case, that he who kills the other was master of his temper at the time, and still less where the quarrel

[1] *Empress* v. *Abdul Hakim*, 3 All. 253.
[2] 1 Hale, P.C. 453; 1 Hawk. P.C. 97.

was voluntarily brought about by the one who takes advantage of it to kill his opponent.[1] The last clause of the Exception, as to taking undue advantage, and acting in a cruel and unusual manner, seems, according to the English decisions, rather to apply to the beginning than to the end of the proceeding, and to be taken as furnishing evidence that the injury was inflicted deliberately, and not under the influence of passion. *Mawgridge's* case[2] is stated as follows, in Foster's Crown Law, 295, in reference to this question. "Mawgridge, upon words of anger, threw a bottle with great force at Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge and wounded him, whereupon Mawgridge stabbed Cope. This was ruled to be murder; for Mawgridge in throwing the bottle showed an intent to do some great mischief; and his drawing immediately showed that he intended to follow the blow; and it was lawful for Mr. Cope, being so assaulted, to return the bottle." On the other hand, where the quarrel has reached the extent of a hand-to-hand contest, the use of a deadly weapon, though wholly inexcusable as a matter of self-defence, has been held to be reduced below murder in consideration of the heat of passion.[3] *A fortiori* would this be the case where the weapons used, such as *lathis*, are not necessarily deadly, though capable of being used with fatal effect.[4] Mere passion, not excited by a quarrel ending in a fight, is not sufficient. A man killed his wife, and the sessions judge held, under Exception 4, that the offence was not murder, saying that the blow was "probably given in the sudden heat of passion, and without any intention of causing death." Jackson, J., said: "To bring the case within the Exception he alludes to, he must find all the facts mentioned in that Exception. In this case there does not seem to have been any fight at all, and certainly the offender took most undue advantage of his unfortunate wife, who was cooking his dinner, in assaulting her with the heavy stool, and acted in a most cruel and unusual manner."[5]

Even in days when duelling was a matter of daily occurrence, and when deaths resulting from it passed without notice, the English law was inflexible in holding that killing

[1] 1 Hawk. P.C. 96, 97. [2] Kelyng, 119.
[3] 1 East, P.C. 244. [4] *Reg.* v. *Zalim Rai*, 3 Suth. Cr. 33.
[5] *Reg.* v. *Akal Mahomed*, 3 Suth. Cr. 18.

in a duel was murder, both in the principal and his second.[1] Duelling, of course, does not come within Exception 4, and is not protected at all, unless it comes within the next Exception.

§ 423. **Consent.**—*Exception* 5.—Culpable homicide is not murder, when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent.

The original Commissioners, writing in 1837 of a similar provision, s. 298, in their Code, say:[2] "Our reasons for not punishing it so severely as murder are these: in the first place the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who at the entreaty of a wounded comrade puts that comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease; the freedman who in ancient times held out the sword that his master might fall on it; the high-born native of India who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins. Again, this crime is by no means productive of so much evil to the community, as one evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society, etc."[3] It is singular that Mr. Macaulay, who wrote this passage, legislating for a country where Warren Hastings had shot a member of his own council in a duel, living in an age when men like Canning, Castlereagh, and Wellington fought duels, and being perfectly familiar with the English law, should not have thought of noticing the effect of this clause on the penalties of duelling, either by admitting that it did, or by explaining why it did not, reduce the killing of a man in a duel

[1] 1 Hale, P.C. 443; 1 Hawk. P.C. 97.

[2] Appendix, Note M, p. 145.

[3] See a very curious case of the murder of a wife at her own request by her husband (*Reg.* v. *Anunto*, 6 Suth. Cr. 57).

from murder to something less. The words of the clause undoubtedly include the case. A man who voluntarily stands up to be shot at twelve paces, consents to take the risk of death, a risk which no act of his can lessen or avert. The restrictions appended to the clause in the draft of 1837, and the reasons above cited, are just as applicable to duelling as to any of the other cases suggested. When, however, the Code was about to assume its present form, several of the officials to whom it was submitted referred to cl. 298 as applying to a fatal duel, and the Commissioners of 1846 in their first Report (ss. 287—290) accept and approve of this view, and of the policy of so changing the law. They also point out "that in the draft of the Code first printed, a duel was given as an illustration of "voluntary culpable homicide by consent." I think, therefore, there can be no doubt that Exception 5, which is merely the original s. 298 without its limitations, does reduce the offence of killing an antagonist in a fair and open duel from murder to culpable homicide.

§ 424. An analogous, but by no means identical, question has arisen several times in Bengal, and has given rise to conflicting decisions, viz. whether Exception 5 applies to the case of bands of men, who go out with a premeditated determination to meet and fight each other, and armed with more or less deadly weapons. In the first of these cases[1] a dispute as to a piece of land had arisen between Abdool Lashkar and Abdool Khoondkar. Lashkar came with a party of fifty or sixty men armed with spears and *latties* to plough the land. They were met by a similar party of Khoondkar's men. A fight took place, in the course of which Assuruddin, one of the Khoondkar party, met his death. The sessions judge found that the evidence clearly established that Assuruddin was present at the riot as a professional *lattial* under the leadership of one Nasiruddin; and that the deceased and the men with whom he was siding, being also professional spearmen, brought on the fight intentionally, and that they entered into it willingly and with pre-consent, being well aware of the risk they ran by so doing. He therefore found that the case came within Exception 5. On appeal by the prisoners the findings of the sessions judge were accepted, but the High Court considered that he had been mistaken in his law, and that the case was really one

[1] *Reg.* v. *Rohimuddin*, 5 Cal. 31.

of murder. Ainslie, J., said (p. 34): "I cannot concur in the view taken by the judge, that when persons of full age voluntarily engage in a fight with deadly weapons they take the risk of death with their own consent, and that as a consequence, culpable homicide occurring in such a fight is not murder. If this view be correct, the 4th Exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel is not murder. It seems to me that the 4th Exception clearly indicates that culpable homicide in a fight is murder unless the fight is unpremeditated, and is such as is therein described, sudden, in the heat of passion, and upon a sudden quarrel. A fight is not *per se* a palliating circumstance; only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the 5th Exception has any application to such a case. I understand that Exception to apply to cases when a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated." Broughton, J., was of the same opinion, and instanced a *suttee* as a case coming within the 5th Exception.

As regards the difficulty founded on the 4th Exception, it will be observed that it and the 5th relate to completely distinct matters. The 4th Exception affirms the law of England as to sudden fights. Exception 5 alters the law of England as to deliberate and premeditated acts causing death. It may be a question what the draftsman meant; but if he did mean what the sessions judge thought he meant, he certainly would have framed distinct clauses to convey his intention.

§ 425. In the next year an exactly opposite decision was given upon facts of a precisely similar character.[1] In that case, White, J., referred to a former, unreported, decision of his own in 1877, in which he said: "A man who, by concert

[1] *Shamshere Khan* v. *Reg.*, 6 Cal. 154.

with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and as he voluntarily puts himself in that position, he must be taken to consent to incur that risk. If this reason is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riotous assemblies, who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons." He therefore declined to agree with the previous case, and reversed the conviction for murder. These three decisions were again considered by a Full Bench of the same court, in a case which also seems to have been precisely similar in its facts to those in 5 & 6 Cal.[1] The judges agreed in thinking that duelling, or fights of a similar character, between two combatants meeting each other with deadly weapons, came within the Exception. They also agreed that the same rule would apply to larger numbers, if the facts made out "that the deceased did, within the meaning of the Exception, consent to suffer death, or to take the risk of it, at the hands of any person who might be a member of the hostile party." They did not support the construction put upon the section in the case in 5 Cal. Nor did they dispute that, upon the facts found by White, J., in the two cases in which he took part, the decisions were correct. What they all laid down was, that the question, whether, in any particular case of conflict between two bodies of armed men, the deceased had consented to take the risk of death, was not a matter of law, to be necessarily inferred from the fact that he formed part of an armed body meeting a similar armed body, but was a question of fact, depending on the circumstances of his particular case. Pigot, J., whose judgment was adopted by Petheram, C.J., and Macpherson, J., said (p. 489): "I think the Exception should be considered in applying it, first, with reference to the act consented to or authorized; and next, with reference to the person or persons authorized. And I think that, as to each of these, some degree of particularity, at least, should appear upon the facts proved, before the Exception can be said to apply. I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some

[1] *Reg.* v. *Naya Muddin*, 18 Cal. 484.

definite circumstances—not merely of time, but of the mode of inflicting it—specifically consented to, as, for instance, in the case of *suttee*, or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code. Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent being given. I do not doubt that the consent may be inferred from circumstances, and does not absolutely need to be established by actual proof of their consent."

§ 426. It seems to me that there is a little confusion in this judgment, from not distinguishing sufficiently between consenting to death and taking the risk of death. A man consents to death when the infliction of it is a friendly proceeding, which he authorizes. He takes the risk of death when it is a hostile proceeding, which he neither consents to nor authorizes, but which he foresees as the possible termination of a conflict on which he is determined to enter. A person who consents to death, as in the case of *suttee*, or taking poison when attacked by hydrophobia, no doubt consents to it under distinct limitations of time, mode, and agent. The person who inflicts the death is restricted by the terms of the authority. In a formal duel each combatant takes the risk of a contest, strictly limited by rules as to weapons, duration of the combat, etc. But in the case of two bodies of armed men there is no consent to death, and no authority to inflict it. Each takes the chance of whatever may happen. The only question will be, What does he take the chance of? If a party go out with their fists, or ordinary sticks, they do not expect to take the risk of ; attacked with guns or spears. But if a party armed ns, spears, and *latties* goes out to meet another party arly armed, each member of the party takes the risk e general result of the fight. It is impossible to distinguish between one member and another, and to require proof that a man who was only armed with a *latti* took the risk of being speared or shot. It is necessary to show that the deceased was a member of a party which went out to seek a contest which might end fatally, and expecting to meet a party similarly prepared. It is also necessary to show that he shared in the common purpose of his party. It is difficult to see what further evidence could be given. It could hardly be alleged on behalf of such an individual who met with his death, that he took the risk of killing, but did not take the risk of being killed.

§ 427. It has been held, that where death supervenes upon emasculation, voluntarily submitted to by an adult, the operator is not guilty of murder, but only of culpable homicide.[1]

In one very curious case, the accused, who professed to be snake-charmers, induced the deceased to suffer themselves to be bitten by a poisonous snake, the fangs of which had been but imperfectly extracted, under the belief that they would be protected from harm. The judges (Norman and Jackson) doubted whether the accused had not committed murder. But, on the supposition that the prisoners believed, though erroneously, that they had the power of restoring to health persons who might be bitten, they were held to have acted in the belief that the deceased gave their consent "with a full knowledge of the fact, in the belief of the existence of power which the prisoners asserted and believed themselves to possess," and that their offence fell, therefore, under this Exception.[2] See a similar case, where there was no such express consent.[3]

The consent which is necessary to reduce the offence of culpable homicide under Exception 5 is such as has already been defined by s. 90, as to which see the remarks on that section, *ante*, §§ 194—196.

§ 428. By s. 301, if a person, by doing any thing which he intends or knows to be likely to cause death, commits culpable homicide, by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been, if he had caused the death of the person whose death he intended or knew himself to be likely to cause. Exception 1 to s. 300 contains a similar provision in regard to culpable homicide committed under provocation. If a person intending to murder another lays poison for him, or shoots at him, and the poison is taken by a person for whom it was not intended, or the shot strikes a person at whom it was not aimed, this is murder.[4] But if the blow was given under the influence of great provocation, it will not be murder, even though it falls upon a person who had not given the provocation.[5] And so it would be, if in the course of a sudden

[1] *Reg.* v. *Baboolun*, 5 Suth. Cr. 7; S.C. 1 Wym. Cr. 12.
[2] *Reg.* v. *Poonai Fattemah*, 3 B.L.R. A. Cr. 25; S.C. 12 Suth. Cr. 8.
[3] *Empress* v. *Gonesh Dooley*, 5 Cal. 351; *ante*, § 410.
[4] Foster, Crim. L. 261; *Reg.* v. *Latimer*, 17 Q.B.D. 359.
[5] *Brown's* case, 1 East, P.C. 245.

fight, a blow which was aimed at one of the combatants fell by mistake upon a third party, who had come up to separate them.

§ 429. **Evidence of Death.**—As regards the evidence in cases of culpable homicide, the first thing, of course, is to prove the death. Lord Hale says: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead."[1] He mentions two cases; one within his own knowledge, where A was missing, and B was supposed to have murdered him and consumed his body in an oven. B was convicted and executed, and a year after A returned, having been sent off to sea against his will by B. In another case, an uncle who had charge of his niece, to whom he was heir at law, was correcting her for some offence, and she was heard to say, "Good uncle, do not kill me." The child disappeared, and the uncle being charged with murdering her, produced another child, who was proved not to be his niece. The uncle was convicted of murder, and executed; the fact was that the real child, being beaten, had run away, and when it came of age, returned and claimed its land, and was proved to be the rightful claimant. And, accordingly, where a woman was indicted for the murder of her bastard child, and it appeared that she had been seen with the child at six p.m., and arrived at another place without it about eight p.m., and the body of a child was found in the river, near which she must have passed, but it could not be identified as her child, and the evidence was rather the other way, it was held that she was entitled to an acquittal; the evidence rendered it probable that the child found was not hers, and with respect to that which really was her child, the prisoner could not by law be called upon, either to account for it, or to say where it really was, unless there was evidence to show that it was actually dead.[2] So where a corpse was found and identified as that of a man who was missing from his village, and evidence was given to show that the prisoners had beaten to death some unknown thief in a neighbouring village, and the sessions judge had convicted them of killing the missing man, whose corpse was found, the conviction was set aside. Assuming that some one had been killed, there was nothing to show that the person killed was the man whose corpse was found.[3]

[1] 2 Hale, P.C. 290. [2] *Reg.* v. *Hopkins*, 8 C. & P. 591.
[3] *Reg.* v. *Ram Ruchea Singh*, 4 Suth. Cr. 29.

On the other hand, convictions have been sustained, though the body was not found, where there was very strong direct evidence to the murder; or where the evidence, though it fell short of actual identification of the body, led almost conclusively to the belief that something found was the body.

"Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness, being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up, and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before the body was thrown into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved by the judges) was afterwards executed.[1] And so a conviction for murder was directed by the High Court of Allahabad, in a case where the sessions judge had considered that he could not convict, because the body of the murdered woman was not found. There, it is stated by the judgment, that "apart from Bhagirath's own confession of having killed the woman Baiji, there is cogent and convincing proof of his guilt, and of her death by violence at his hands."[2]

§ 430. Not only must the death be proved, but it must be shown not to have arisen from natural or accidental causes, or from suicide. In India the necessary examination for this purpose can hardly be made at all unless it is made at once. The Crim. P.C., s. 45, requires village headmen and others to send immediate information to the nearest magistrate, or officer in charge of a police-station, of the occurrence of any sudden or unnatural death, or of any death under suspicious circumstances. Section 174 directs the mode in which the police officer is to proceed on receiving such information. A collection of rules, issued by the various Governments of India, as to the mode of conducting such

[1] *R.* v. *Hindmarch*, 2 Leach, 569, followed in a very similar case, *Reg.* v. *Purusoolah*, 7 Suth. Cr. 14.

[2] *Reg.* v. *Bhagirath*, 3 All. 383.

investigations will be found in the valuable works on the Criminal Procedure Code, by Messrs. Agnew & Henderson, and Mr. Chintaman H. Sohoni, under s. 174. It would of course be impossible in this work even to hint at the numberless forms which such an inquiry may assume. In a remarkable case tried in Scotland in 1893, where the question was whether the deceased had died by the accidental discharge of his own gun, or whether he had been killed by Mr. Monson, the case ultimately resolved itself into a contest between gunsmiths as to the mode in which shot would spread on leaving the gun. Generally the questions which arise are of a medical character. A mass of information upon medical and surgical matters bearing upon homicide will be found in the works on Indian Medical Jurisprudence, by Mr. Gribble and Dr. Chevers, and in the larger work on the general subject by Dr. Taylor. Some observations on the evidence of experts will be found, *post*, § 766. The whole subject of what constitutes knowledge and intention, and the evidence by which it may be established, has also been discussed in chap. i., ss. 9, 10.

§ 431. **Rash and negligent Acts** which endanger human life, or the personal safety of others, are punishable under s. 336, even though no harm follows, and are additionally punishable under ss. 337 and 338 if they cause hurt or grievous hurt. Until 1870 such acts were not specially punishable if they caused death. The omission was the more important because, under the terms of the Penal Code, they did not constitute the offence of culpable homicide. In England they would be punishable as manslaughter. By Act XXVII. of 1870, s. 12, the present section, 304A, was added to the Code, which creates a distinct offence where any one "causes the death of any person, by doing any rash or negligent act, not amounting to culpable homicide. The first authoritative exposition of the law under this section, which will also govern the less important sections, 336, 337, and 338, was given by Holloway, J., in the case of *Reg.* v. *Nidamarti*.[1]

"In this case the prisoner killed his own mother by beating and kicking her. The sessions judge finds that the death resulted from a brutal beating and kicking, but he acquits of culpable homicide, because the violence was not such as the prisoner must have known to be likely to cause

[1] 7 Mad. H.C. 119.

death. This is, it is manifest, no ground for acquitting of culpable homicide not amounting to murder; with such knowledge the act would be murder.[1] The question for the judge was, whether the act was done with the knowledge of causing bodily injury which was likely to cause death. The judge finds the brutal beating and kicking and dragging by the hair of the head of an old woman of sixty by a powerful man, who so acted without the smallest provocation. The causal connection between the brutal assault and the death is found to be undoubted, but the sessions judge has convicted the prisoner under the new section of causing death by a rash act. This section is, in our opinion, wholly inapplicable to the facts of this case. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act, or series of acts, themselves intended, which are the direct producers of death. To say that because, in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception. As this is neither a case of rashness nor of negligence, it becomes unnecessary to consider whether in any case a conviction under this section can properly follow, where the rashness, or negligence, amounts to culpable homicide. It is clear, however, that if the words 'not amounting to culpable homicide' are part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death."

P.C., s. 300, cl. 2.

§ 432. This decision was cited and followed by the Calcutta High Court, in a case where a child-wife, about eight or nine years old, died instantly from a kick on the back with a bare foot, which ruptured the coat of the stomach. The court said that s. 304A does not apply to any case in which there has been the voluntary commission of an offence against the person. It was stated that Mr. Holloway's judgment had been recently approved by the Chief Court of the Punjab, and reproduced in a circular addressed by it to all courts.[1] In Allahabad a man had struck his wife a heavy blow on her side with a stick, and she having a diseased spleen, died instantly. The judge convicted the husband under s. 304A, but the High Court quashed the conviction, and substituted one for grievous hurt under s. 325. Straight, J., answered the doubt suggested by Mr. Justice Holloway, by saying, "It is to be observed that s. 304A is directed at offences outside the range of ss. 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned enters. For the rash or negligent act which is declared to be a crime, is one 'not amounting to culpable homicide,' and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded." He also defined rash and negligent acts very much in the language of the Madras judgment.[2] Similar decisions were given in other cases, where the acts causing death ranged from a mere assault to culpable homicide not amounting to murder.[3] On the other hand, the section has been held applicable to the negligent management by a railway official of trucks on an incline, by means of which they got out of control, and killed a cooly;[4] to the conduct of a lessee of a ferry in using an unsafe boat, which sank without meeting with an accident, and so caused the death of a number of passengers;[5] to a death caused by a native physician in executing a dangerous operation without any knowledge of the consequences which would follow;[6] to

[1] *Reg.* v. *Retabdi Mundal*, 4 Cal. 764. Here the conviction was changed to one of culpable homicide under s. 304.

[2] *Reg.* v. *Idu Beg*, 3 All. 776.

[3] *Reg.* v. *Acharjys*, 1 Mad. 224; *Reg.* v. *Damodaran*, 12 Mad. 56; *Reg.* v. *Mt. Pemkoer*, 5 N.W.P. 38; *Reg.* v. *Man*, *ibid.* 235; *Reg.* v. *Gonesh Dooley*, 5 Cal. 351; and cases, *post*, §§ 433, 434.

[4] *Reg.* v. *Nandkishore*, 6 All. 248. See as to railway accidents, *ante*, § 410.

[5] *Reg.* v. *Bhutan*, 16 All. 472.

[6] *Sukaroo Kobiraj* v. *Reg.*, 14 Cal. 566.

the act of a husband, who, by having connection with his wife, a completely immature child of eleven years and three months, ruptured the vagina and caused her death. In this case there were counts under s. 304A and s. 338, upon either of which, under the directions of Wilson, J., the jury might have convicted. They found a verdict under s. 338.[1] In consequence of this and similar cases, the age of consent by a girl to sexual intercourse was raised from ten to twelve by Act X. of 1891.

§ 433. As to deaths, or other injurious consequences, following upon mistaken medical practice, Lord Hale says: "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgeon. And I hold their opinion to be erroneous that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physics and salves were before licensed physicians and chirurgeons."[2] This opinion of Lord Hale's was followed by Blackstone, and is the basis of the English law on the subject.[3] In a case against *St. John Long*, an unlicensed practitioner, who professed to perform cures by rubbing in a very irritating liquid, which caused a patient's death, Bayley, B., said: "To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be guilty of manslaughter."[4] And so in a case where a woman was supposed to have died from an excessive dose of a medicine containing prussic acid, Cockburn, C.J., said: "If a man takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he

[1] *Reg.* v. *Hurree Mohun Mythee*, 18 Cal. 49.
[2] 1 Hale, P.C. 429.
[3] *Per* Hullock, B., *R.* v. *Van Butchell*, 3 C. & P. 629.
[4] *R.* v. *St. John Long*, 4 C. & P. 423, at p. 440.

is guilty of manslaughter."[1] These rulings seem exactly adapted to the conduct contemplated by ss. 304A, 336, 337, and 338, and not to exact a standard of excellence above what may be required from the ordinary native doctor. In the Calcutta case above referred to,[2] the prisoner was a Kobiraj, and he operated upon the deceased, an old and feeble man, for internal piles, by cutting them out with a common clasp knife, after pulling them down with a hook. The man bled to death. It was proved that the operation which he performed was so imminently dangerous that educated surgeons scarcely ever attempt it. It appeared that he had twice before performed similar operations with success, and he seems to have performed this one with as much confidence, and as little preparation for the probable result, as if he had been cutting a corn. He was convicted under s. 304A. In an earlier case, in 1866, the prisoners performed the operation of emasculation, by the simple process of cutting off all the private parts, without any proper ligature. The operation was performed with the consent of the patient, who died in a few hours. The case was held to be culpable homicide not amounting to murder, and would, no doubt, upon the findings be so held now, and not considered to fall within s. 304A.[3]

§ 434. Attempts have frequently been made to charge a prisoner under s. 304A, in the cases which occur so constantly in India, where a slight injury, falling upon a person with an enlarged spleen, causes immediate death. Probably such a charge will rarely succeed. Where the person struck was known to be suffering from this disease, it would be almost a necessary inference that his assailant knew that his act was likely to be dangerous to life, in which case it would at the least be culpable homicide not amounting to murder (*ante*, § 409). If the blow, or other injurious act, caused hurt, or grievous hurt, independently of the death, and if the unexpected result took the case out of ss. 299 or 300, the prisoner could only be charged and convicted of hurt, or grievous hurt, as the case may be.[4] If the defendant was unaware of the existence of the disease, and the act done did not amount to hurt,

[1] *Reg.* v. *Bull*, 2 F. & F. 201.
[2] *Sukaroo Kobiraj* v. *Reg.*, 14 Cal. 566.
[3] *Reg.* v. *Baboolun*, 5 Suth. Cr. 7.
[4] *Ante*, § 431; *Reg.* v. *O'Brien*, 2 All. 766; *Reg.* v. *Randhir Singh*, 3 All. 597; *Reg.* v. *Idu Beg*, *ibid.* 776.

there could be no conviction under s. 304A, as there was neither rashness nor negligence. Apparently the only conceivable case would be that of a person, knowing that disease of the spleen was prevalent in the district, and knowing also the risk involved in striking a person suffering from the disease, who struck a person who had the disease, but who was not known by the defendant to have it.[1]

As to negligent acts, by which a person suffering from disease spreads infection, see s. 269 and the note upon it, *ante*, §§ 374—376.

§ 435. **Suicide** is the only offence for which it is impossible to punish the principal offender. He is already beyond the reach of human law; those who instigate him, or help him in the act, remain. According to English law they would be either principals or accessaries before the fact to murder. Even where two persons agreed to commit suicide together, if the means employed only took effect upon one, the survivor was held guilty of murder.[2] Under the Penal Code, a person who takes an active part in the suicide of another, as by actually shooting him, or administering poison to him, would commit culpable homicide not amounting to murder under Exception 5, if the person, being over eighteen years of age, gave such a consent as is defined by s. 90. If he was younger than eighteen, or if his consent did not come within s. 90, he would be guilty of murder. If, however, he did not actually cause the death, but abetted it within the meaning of s. 107, he would be punishable under ss. 305 or 306, according as the person actually committing suicide was or was not capable of consent. In a case of *suttee*, some of the prisoners actually set fire to the pile, while one did not co-operate in causing the death of the widow, but took an active part in causing her to return to the pile, when she had left it, after being partially burnt. The Bengal High Court held that the former prisoners were guilty of culpable homicide, but the latter only of abetment of suicide. They said: "Abetment of suicide is confined to the case of persons, who aid and abet the commission of suicide by the hand of the person himself who commits the suicide. When another person, at the request of or with the consent of the suicide has killed that person, he is guilty of homicide by consent, which is one of the forms of culpable homicide."[3]

[1] *Reg.* v. *Safatulla*, 4 Cal. 815. [2] *Reg.* v. *Alison*, 8 C. & P. 418.
[3] *Reg.* v. *Saehbloll Reetloll*, 27 Nov., 1863, 1 R.J. & P. 174.

§ 436. **Attempts to commit** culpable homicide and suicide are punishable under ss. 307, 308, and 309. The last requires very few words. It will be observed that its language exactly follows that of s. 511; the offence created by it could not be punished under s. 511, because, from the nature of things, a completed suicide cannot be dealt with as an offence. Whatever will constitute an attempt to commit an offence under s. 511 will come within s. 309, if the object of the attempt is suicide.[1] The wording of ss. 307 and 308 is completely different; the marginal note, which is not part of the Code, speaks of 'attempt to murder' and 'attempt to commit culpable homicide,' but no such words are found in the text. What is made punishable by the sections is where a person does any act with such intention, or knowledge, and under such circumstances, that if he by that act caused death, he would be guilty either of murder or of culpable homicide not amounting to murder. This seems exactly equivalent to saying that a man is punishable who does an act capable of causing death, with such intention or knowledge that the death, if caused, would be culpable homicide, of the higher or less degree. It is not sufficient, as in s. 511, to do an act towards the commission of the offence.

§ 437. There have been, as far as I know, only two cases upon the construction of s. 307—one in Bombay and one in Allahabad. In the Bombay case, the prisoner presented a rifle at his officer, but it was struck up before he had drawn the trigger, and the rifle was found to be loaded but not capped. It was held by the Bombay High Court that he could not be convicted under s. 307, although when the act was done the prisoner believed the gun was capped. Couch, C.J., said: "It appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things, and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section.

"The illustrations given bear out this view. One is that of a man firing a loaded gun; and another is that of a man placing food mixed with poison on another's table. Both

[1] See as to attempts under s. 511, *post*, chap. xv.

these acts are capable of causing death; but in the present case, although the act was done with the intention of causing death, and was likely in the belief of the prisoner to cause death, yet in point of fact it could not have caused death, and it, therefore, does not come within that section." [1]

On the other hand, in this very same case it was held that the prisoner was properly convicted of an attempt to commit murder under s. 511, since "the presenting of the gun, under the circumstances, was an act of such an approximate nature as to bring the prisoner within the words of s. 511." [2] In the Allahabad case, a man tried to discharge a blunderbuss at another. He pulled the trigger and the cap exploded, but the piece missed fire. It was found loaded after he was seized. Upon these facts, and in accordance, as he supposed, with *Cassidy's* case, the judge found the prisoner not guilty under s. 307, and convicted him under s. 511. The Allahabad High Court held that the conviction under s. 511 was wrong, and directed a conviction to be recorded under s. 307. The decision is, of course, quite in accordance with that in Bombay. It is quite certain that upon the same facts the Bombay High Court would have found, that snapping a blunderbuss fully loaded and capped was an act capable of causing death to a man at whom it was aimed, and that this capacity was not affected by the circumstance that it missed fire; the case would therefore come within s. 307, and a conviction under s. 511 would be bad. The judgment, however, is of importance, because in it Straight, J., completely differed from the Bombay High Court on one point, and seems to have differed from it on another point. First, he thought it necessary to decide, and he did decide, that under no circumstances could an attempt to commit murder come under s. 511. This conclusion he arrived at from the words of s. 511. He said: "Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences which by the Code itself are punishable either with 'transportation or imprisonment.' It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word 'transportation' have inserted the word 'death.' But again, the section goes on and says that, certain things being done, the person who does these acts shall, 'where no provision is made for the punishment of

[1] *Reg.* v. *Cassidy*, 4 Bom. H.C. Cr. 17. [2] *Ibid.*, p. 23.

such attempt,' be punished in a particular way. It seems, therefore, to me, that when the framers of s. 511 drew it up in the terms that they have drawn it up, they specially meant to exclude those attempts to commit offences which, in the various preceding sections of the Code, were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive, and that no court has any right to resort to the provisions of ss. 299 and 300, read with s. 511, for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307 of the Indian Penal Code." [1]

§ 438. Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under s. 303 is only punishable, and in fact can only be punished, with death. Cases of murder therefore do come within the letter of s. 511. It seems obvious too that those words in s. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned judge's reasoning would not apply to s. 308, which is in *pari materiâ* with s. 307, and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt, coming under s. 511, which is specifically provided for elsewhere, must be dealt with under the express provision. For instance, an attempt to wage war against the Queen must be dealt with under s. 121. It is also quite clear that any attempt to commit culpable homicide which falls under ss. 307 or 308, must be dealt with under them and not under s. 511. What the Bombay case decided was, that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under s. 511 because it did not come within s. 307. That being so, it fell within the wording of s. 511, as being a case "where no express provision is made by this Code for the punishment of *such* attempt." According to Mr. Justice Straight, such a case would go wholly unpunished.

[1] *Reg.* v. *Niddha*, 14 All. 38.

§ 439. The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, *viz.* trying to discharge an uncapped rifle, supposed to be capped, did not come within s. 307. "If he did all that he could do, and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own act, volition, and purpose having been given effect to in their full effect, a fact unknown to him and at variance with his own belief, intervened to prevent the consequences of that act, which he expected to ensue, ensuing." But it may be submitted that the question is, not whether the accused would escape criminal responsibility—it was decided that he was liable under s. 511,—but whether he would be criminally responsible under the very special words of s. 307. If that section only applies where the prisoner has done an act, which, if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that Cassidy had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs; that he had levelled it at his officer and pulled the trigger; it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires that he should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was as harmless as a broomstick.

§ 440. Very little help can be obtained from the English cases, as they all turn on the special words of the statute. By two different statutes it was made an offence to attempt, by drawing a trigger or in any other manner, to discharge any loaded firearms at any one. Upon these statutes it was held that a firearm properly loaded but not primed, was not a loaded firearm within the Act.[1] The present statute, 24 & 25 Vict., c. 100, s. 19, provides that a firearm properly loaded in the barrel, shall be deemed to be loaded, although the attempt to discharge it may fail from

[1] *R.* v. *Law*, Russ. & Ry. 377; *Reg.* v. *James*, 1 C. & K. 530.

want of priming or from any other cause. In *Reg.* v. *Brown*[1] the indictment was held to have failed, because on the authority of two cases, the prisoner who had not drawn the trigger, had not attempted to discharge it "in any other manner." In a later case[2] those decisions were overruled, and it was decided that a conviction for attempting to discharge a loaded firearm by drawing a trigger or in any other manner[3] was valid, where the prisoner had drawn a loaded revolver from his pocket, pointed it at his mother, and fumbled with his finger at the trigger, though he was unable to discharge it, because his wrists were held by the bystanders and the pistol was taken from him. This decision would probably be an authority, that if a man presented at another a firearm ready for immediate use, with the intention of discharging it, he might be convicted under ss. 307 or 308, though the weapon was knocked up, or taken from him, before he could attempt to draw the trigger.

§ 441. **Miscarriage, and Offences against Infants.**—Under s. 312 it is an offence voluntarily to cause a woman with child to miscarry, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman; and the offence is liable to additional punishment if the woman was quick with child. The Explanation points out that a woman who causes herself to miscarry is within the section. This offence can only be committed where the woman is either with child or quick with child, and therefore the woman must have been pregnant at the time.[4] The words "with child" mean no more than pregnant. It is not necessary to show that there was anything in the womb which could be called a child, or even that the embryo has assumed a fœtal form.[5] "Quick with child" means that the process of quickening has taken place. According to Dr. Taylor,[6] "Quickening is the name applied to peculiar sensations experienced by a woman about this stage of pregnancy. The symptoms are popularly ascribed to the first perception of the movements of the *fœtus*, which occur when the *uterus* begins to rise out of the *pelvis;* and to these movements, as well as probably to a change of the position in the *uterus*, the sensation is perhaps really due." The process of quickening is not an indication that the *fœtus* has acquired life in any different sense from that which it had before. It

[1] 10 Q.B.D. 381. [2] *Reg.* v. *Duckworth* (1892), 2 Q.B. 83.
[3] 24 & 25 Vict., c. 100, s. 18. [4] *R.* v. *Scudder*, 3 C. & P. 605.
[5] *Reg.* v. *Ademma*, 9 Mad. 369. [6] 2 Taylor, Med. Jur. 148.

merely shows that a particular stage of the pregnancy has been reached, which stage generally produces a particular sensation in the mother. The term "quickening" describes the sensation, and not the stage, and, therefore, as Dr. Taylor says, "No evidence but that of the woman herself can establish the fact of quickening." "Cases every now and then occur in which healthy women do not experience the sensation of quickening during the whole course of pregnancy, and the movements of the child may be at no time perceptible to the examiner." "The discovery of the movements of a child by an examiner is a proof that the usual period of quickening is past; but their non-discovery at the time of the examination is no proof whatever that the woman has not quickened, since the movements are by no means constant, and may be accidentally suspended at several successive examinations." Practically, I suppose, that in the absence of evidence to the contrary, a woman would be considered to be quick with child if it was shown that she was bearing a living child after the extreme period for quickening had past,[1] and especially if the fact of movements was proved. Where the evidence showed that the child was fullgrown at the time the offence took place, Glover, J., said: "I think it improper to convict under s. 312 of the Penal Code, which supposes an expulsion of the child before the period of gestation is completed. But the evidence is perfectly clear as to the intention and acts of the parties, and they may both be properly convicted of an attempt to cause miscarriage under ss. 312 and 511."[2] The section, however, says nothing about expulsion before the full period of gestation, and it is submitted that the words "miscarriage," and "causing a woman to miscarry," are satisfied by any process by which a premature and artificial expulsion of an infant is effected, by means which are not intended and calculated to bring it into the world in a healthy state.

§ 442. The offence created by s. 312 is actually causing a woman to miscarry. If she is pregnant, and the means used do not succeed, the accused could only be convicted under s. 511 of an attempt. A more difficult question would arise if the attempt failed, because the woman was never

[1] Taking the general experience of accoucheurs, quickening happens from the tenth to the twenty-fifth week of pregnancy; but the greater number of instances occur between the twelfth and sixteenth week (2 Taylor, 149).

[2] *Reg.* v. *Aranja Bewa*, 19 Suth. Cr. 32.

pregnant. In England a woman was indicted under s. 58 of 24 & 25 Vict., c. 100, for doing certain acts with intent to procure her own miscarriage. The section only applies to a "woman being with child." It turned out that she had never been pregnant, and it was held that she could not be convicted under the section, but might be convicted of conspiring with those who assisted her to procure her own miscarriage.[1] There, however, the same section made such acts punishable in others, whether the woman was with child or not. She was, therefore, conspiring with them to do an act which in them was illegal. This, under the Code, would be an abetment of their act under s. 107. But an unsuccessful attempt to procure a miscarriage is not punishable except as an attempt. Can it be punishable under s. 511, when it is an attempt to do that which is physically and legally impossible? It was at one time held in England that a man could not be convicted of an attempt to pick an empty pocket.[2] This decision, after being long discredited, has at last been overruled.[3] It may fairly be argued that a man who intends to do a criminal act, and tries his best to do it, cannot be held not to have attempted it, because a circumstance of which he was ignorant made it impossible for him to succeed. If in the attempt he caused hurt, grievous hurt, or death to the woman, he could not plead her consent either under s. 87 or under s. 300, Exception 5, as the consent was given to an act which was an offence independently of the harm it would cause to the woman who gave the consent (s. 91). Accordingly, where a man gave his wife a drug to cause abortion, they believing that she was pregnant when she was not, and she died from taking it, he was convicted of manslaughter.[4]

§ 443. Under s. 313, causing a miscarriage is additionally punishable, if it is done without the woman's consent, whether the woman is quick with child or not. If an act done with the intent to cause the miscarriage of a woman with child causes her death, it is also specially punishable, the punishment varying according as the act was done with or without the woman's consent (s. 314). The Explanation states that it is not essential to this offence that the offender

[1] *Reg.* v. *Whitchurch*, 24 Q.B.D. 420.
[2] *Reg.* v. *Collins*, L. & C. 471.
[3] *Reg.* v. *Brown*, 24 Q.B.D. 357; and see *Reg.* v. *Williams* (1893), 1 Q.B. 320.
[4] *Reg.* v. *Gaylor*, D. & B. 288.

should know that the act was likely to cause death. If, however, the death was caused by an act likely to cause death, it would be at the least culpable homicide not amounting to murder, and might even be murder if the act was of an eminently dangerous character. This section, however, will only apply where the act done by the offender, or for which he is jointly responsible (see s. 34, *ante*, § 231), is the act which causes the death. It is not sufficient that he has done an act whereby some one else is enabled to cause death. In a case in England a man was indicted for murder of a woman. It appeared that she, being pregnant, requested him to procure her an abortion, and threatened to destroy herself if he refused, and that he, in consequence, procured for her a poisonous drug. He knew the purpose for which she wanted it, and gave it to her for that purpose; but he was unwilling that she should use it, and he was not present when it was taken. The woman died from the effects of the poison. The Court held that the conviction could not be sustained, saying that "it would be consistent with the facts of the case that he hoped and expected that she would change her mind, and would not use the drug."[1] Under similar circumstances, I conceive that no charge would be maintainable under s. 314, or under ss. 312, 313, or 315. But the prisoner would be guilty of abetting her to commit the offence specified in s. 312.[2] And he would be guilty in the same manner if he supplied her with a drug calculated to procure a miscarriage, with the intention that it should be so used, although neither the woman herself, nor any other person than the defendant may have intended to use it for that purpose.[3]

§ 444. Sections 315 and 316 are intended for the protection of unborn children. If a man, intending to prevent the birth of a living child, does any act, either through the medium of a miscarriage or otherwise, which prevents the child from being born alive, or causes it to die after its birth, and if such act is not done in good faith, for the purpose of saving the life of the mother, he commits an offence under s. 315. If, however, without any special intention to injure the child, he injures the mother in such a way that she died, he would be guilty of culpable homicide; then

[1] *Reg.* v. *Fretwell*, L. & C. 161; 31 L.J. M.C. 145.
[2] See s. 107, cl. 3, Explanation 2.
[3] *Reg.* v. *Hillman*, L. & C. 343; S.C. 33 L.J. M.C. 60; P.C., s. 108, Explanations 2, 3.

if his act causes the death of her quick unborn child, he commits an offence under s. 316. A man who assaults a pregnant woman with such violence that her death is a likely result, or sets fire to a house in which she happens to be, would be punishable under this section, if the mother survived, but gave birth to a dead child in consequence of her injuries, or of the fright.

§ 445. Section 317 renders punishable the act of any one who, being the parent, or having the care of a child under the age of twelve, exposes it or leaves it in any place with the intention of wholly abandoning it.

In a Madras case the following facts arose. A, the mother of a newly born child, being herself too ill to move, sent B to expose it. It was held by Scotland, C.J., that A could not be convicted under this section as she had not actually exposed the child, nor B, as she was not the mother. Also, that neither A nor B could be indicted for abetting the other, since as neither could have committed the offence there could be no abetment by the other.[1] Of course, a person who has the custody of a child merely for the purpose of exposing it, cannot be indicted as a person "having the care of such child." Where the mother of a child packed it up carefully in a hamper, and sent it off by train to the address of its father, where it was safely delivered, it was held that this came within the words of the English statute, which makes it penal to "abandon or expose any child under the age of two years, whereby the life of such child shall be endangered."[2] And so, where a mother who was living apart from her husband left the child at his door, and he refused to take it in, saying, "it must bide there for what he knew, and then the mother ought to be taken up for the murder of it;" he was convicted under the same statute.[3]

The offence is completed by the abandonment of a child of tender years by a person who was bound to take care of it. It is not necessary that any harm should happen to the child. An Explanation follows that this section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure. Of course, no such offence would be committed, even if the child die, unless the death was a likely result of the exposure. This would depend

[1] *Reg.* v. *Beejoo Bee*, 1st Mad. Sess., 1869.
[2] *Reg.* v. *Falkingham*, L.R. 1 C.C. 222.
[3] *Reg.* v. *White*, L.R. 1 C.C. 311.

much upon the age of the child, and the circumstances of time and place under which it was abandoned. Where the death did not come within the terms of s. 299 or s. 300, it could hardly fail to come under s. 304A. In all such cases, it is right to charge the prisoner under s. 317 as well, but if there is a conviction for the more serious offence, the minor is merged in it. There cannot be a conviction under both charges.[1] On the other hand, the charge of causing death cannot be sustained unless it is a result directly traceable to the abandonment. A newly born child was left warmly wrapped up in a place where it was almost certain to be found, and where, in fact, it was found at once. Those who found the infant appear to have done everything in their power for it, but the child refused to take the cow's milk which was offered it, and died from want of sustenance. It was held that the prisoner, though guilty under s. 317, could not be convicted of murder.[2] Probably he could have been convicted under s. 304A, if it had then become law.

§ 446. Section 318 is intended, indirectly, to protect children, by rendering it an offence intentionally to conceal, or endeavour to conceal the birth of a child, by secretly burying or otherwise disposing of its dead body, whether it die before, or after, or during its birth. The section is designed to meet the case of illegitimate children, which is probably the only case in which such a concealment would be attempted. A woman is not bound to announce that she is going to have a child; and if the child lives, she is quite at liberty to keep its existence secret. Bnt if it is born dead, or dies after its birth, the dead body must not be concealed by getting rid of it privately. The section is substantially the same as the English statute, 24 & 25 Vict., c. 100, s. 60, the decisions on which will no doubt be followed in India.

The child must be a child, and not a *fœtus*.[3] Erle, J., in charging the jury, told them that "this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive.

[1] *Reg.* v. *Banni*, 2 All. 349.
[2] *Reg.* v. *Khodabux*, 10 Suth. Cr. 52.
[3] *Reg.* v. *Hewitt*, 4 F. & F. 1101.

There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the *fœtus* was but a few months old, and therefore could have no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may perhaps be safely assumed that, under seven months, the great probability is that the child would not be born alive."[1]

§ 447. The act which is criminal is the secretly disposing of the body after it is dead. Some act intended for this purpose must be shown. If a woman, whether intentionally or otherwise, gives birth to a child in a secret place, and leaves it there, if the child is born alive, she has committed an offence under s. 317, but if it is born dead she has committed no offence under s. 318.[2] Secrecy is the essence of the offence, and if the dead body is left in a public place, where it will be found by people who are not looking for it, this is not an offence. The crime consists in concealing the dead body, not in disposing of it so as to conceal the fact that it was born of its mother.[3] It is not necessary to show that the child was concealed in the place where it was found, if the place was one where it would probably not be found. The dead body of a child was taken into a yard at the back of a public-house, and thrown over a wall four and a half feet high into a field at the other side of the wall. The yard was not a public thoroughfare, and the field was one used for grazing cattle, in which no one had any business except those who had to do with the cattle, and they would not be likely to approach the spot where the child lay. Brett, J., left to the jury the following question: "Did the wall and the position of the child in the field, and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who by searching for the child might find it, or by going out of the way in the field, or by looking over the wall, might accidentally discover it. If they found an answer in

[1] *J.* v. *Berriman*, 6 Cox, 388, followed in Madras, 4 Mad. H.C. Rulings 63. Instances are recorded of children born in the sixth month having survived and were grown up. They may be born alive at any period between the sixth and seventh months, or even, in some instances, earlier than the sixth; but this is rare, and if born living, they commonly die soon after birth (2 Taylor, Med. Jur., pp. 246—249).

[2] *Reg.* v. *Turner*, 8 C. & P. 755.

[3] *Reg.* v. *Clark*, 15 Cox, 171; Steph. Dig. Crim. L., art. 235.

the affirmative, they might find that there was a secret disposition of the body, but if they found an answer in the negative, they could not find that there was a secret disposition." This direction was held to be right, and the conviction was affirmed. Bovill, C.J., said: "What is a secret disposition must depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place where the body would not be likely to be found."[1] It will be observed that the offence may be committed either by the mother, or by any one else, who does it with the intent specified in the section.

In England it is held essential to a conviction to show, not only that a woman has been delivered of a child which has not been accounted for, but that a dead body has been found, which can be identified as that of the child to which she gave birth. If no dead body has been found, the child may still be living; and if a dead body is found, but not identified, it is possible that, even if the child did die, it may have been buried elsewhere with all necessary publicity, or otherwise disposed of in a manner which is not within s. 318.[2]

[1] *Reg.* v. *Brown*, L.R. 1 C.C. 244.
[2] *Reg.* v. *Williams*, 11 Cox, 684.

CHAPTER X.

OFFENCES AGAINST MINORS AND WOMEN.

I. Kidnapping and Abduction, §§ 448—458.
II. Slave-dealing, §§ 459, 460.
III. Dealing in Prostitution, §§ 461—464.
IV. Rape, §§ 465—478.

§ 448. **Kidnapping.**—In order to make out the offence of kidnapping from lawful guardianship under s. 361, it is necessary to show (1) that a minor of either sex, under fourteen years of age, if a male, or under sixteen, if a female, or of unsound mind, (2) who was at the time in the keeping of a lawful guardian, (3) has been taken or enticed out of such keeping (4) without the consent of such guardian.

(1) The age or mental incapacity of the person taken is a matter of fact, as to which the accused may either have no opinion, or may have an erroneous opinion. It was decided in *Reg.* v. *Prince,* which has already been fully discussed,[1] that even a *bonâ fide* belief, reasonably entertained, that a girl was over sixteen, was no defence. The decision was given upon the English statute, 24 & 25 Vict., c. 100, s. 55, which is substantially the same as s. 361, except that it contains the word "unlawfully,"—"Whoever shall unlawfully take," etc. This, as Bramwell, B., said (p. 173), merely means, Whoever shall take without lawful cause. The word "unlawfully" is not found in s. 361, as every definition of an offence in the Code is subject to the chapter of General Exceptions. I doubt, however, whether the same decision would be given if a man took a woman above sixteen, where the illegality consisted in her being of unsound mind, if it could be shown that he did not know, and had no reason to suppose, that she had not the ordinary mental capacity. The judges who affirmed the conviction

[1] L.R. 2 C.C. 154; *ante,* § 122.

in *Prince's* case, considered that the taking of a girl in the possession of another, against his will, was so obviously wrong that the person who did the act must suffer the consequences, if the girl turned out to be younger than he supposed. But sanity is the normal state of human beings, and the taking of a woman of mature years, who is not married, and who consents to being taken, is not wrong in any legal sense of the word, and violates the rights of nobody. Under s. 497, it is not an offence to have intercourse with a married woman, unless the accused knows, or has reason to believe, that she is married. *A fortiori*, one would imagine that the offence of taking away a woman of unsound mind would involve a knowledge or reasonable suspicion that her mind was unsound.

§ 449. **Lawful Guardian.**—(2) The person taken must have a lawful guardian, and at the time of the alleged offence must be in the keeping of that guardian. The Explanation states that the words "lawful guardian" include any person lawfully entrusted with the care or custody of such minor or other person. These terms would include not only the parents or relations in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right: for instance, the keeper of a school, or the master or mistress in whose service the child is placed. It would also cover those cases which frequently lead to litigation, where a child has been taken under the care and protection of persons who had no legal right to it, when the parents have been unable or unwilling to provide for it. In such cases it was always the practice of the Chancery courts, and, since the amalgamation of the two jurisdictions, it is the practice of the Common Law courts, even upon a *habeas corpus*, to consider solely what is for the interest of the child, and to refuse to give it up to the parent, even though he can be charged with no misconduct, if it is for the benefit of the child that it should remain where it is.[1] The same rule has been lately adopted by the Bombay High Court, and appears to be in accordance with the Guardian and Wards Act of 1890.[2] There can be no doubt that a person who had come to occupy such a position

[1] *Reg.* v. *Gyngall* (1893), 2 Q.B. 232.
[2] Act VIII. of 1890, ss. 7, 12, 17; *re Saithri*, 16 Bom. 307.

towards a child would be considered its lawful guardian under s. 361. So the husband of a girl of fifteen is her natural guardian;[1] and under the English stat. 4 & 5 Philip and Mary, c. 8, s. 3, the father of an illegitimate child was held to be a person who had by lawful ways or means the keeping of the child.[2] According to English law, the relationship of such a father to his natural child is only recognized for the purpose of making an order upon him for its support during infancy, under the Bastardy Act. Under Hindu law, the relationship is recognized, and imposes upon the father distinct obligations for its maintenance.[3] The exact extent of the rights of the mother of an illegitimate child appears to be unsettled.[4] There seems to be no doubt, however, that she is its natural and proper guardian during the period of nurture, and that a person to whom she entrusted the child on her death-bed would be its lawful guardian within the Explanation in s. 361. Garth, C.J., said: "We think that the somewhat liberal explanation of the words 'lawful guardian' under s. 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly, in cases of this kind, that the person from whose care or custody a minor had been abducted or kidnapped, came strictly within the meaning of a guardian, according to the legal acceptation of that word."[5] Where, however, an orphan girl, under fourteen, attached herself first to one person and then to another, and finally became betrothed to the son of the latter, from whom she was enticed away by the prisoner, it was held that he had committed no offence, as the person from whom he had taken the girl was in no sense her guardian, or lawfully entrusted with her care.[6]

§ 450. Neither under English nor under Hindu law can a mother remove her child from the custody of its father, who is its lawful guardian, unless under such special circumstances as might render such a step necessary for the safety of the child.[7] Under Mohammedan law, the mother

[1] *Re Dhuronidhur Ghose*, 17 Cal. 298.
[2] 1 Hawk. P.C. 128; 1 East, P.C. 457.
[3] Mayne, Hindu Law, § 408.
[4] See *per* Lord Herschell, *Barnardo* v. *Hugh* (1891), A.C., at p. 398.
[5] *Reg.* v. *Pemantle*, 8 Cal. 971.
[6] *Reg.* v *Buldeo*, 2 N.W.P. 286.
[7] *R.* v. *Greenhill*, 4 Ad. & Ell. 624; *Reg.* v. *Prankrishna Surma*, 8 Cal. 969.

is entitled, even as against the father, to the custody of her sons up to seven years, and of her daughters up to puberty, according to the Sunni School of law, and up to seven years, according to the Sheah School.[1]

§ 451. The minor must be, at the time of the taking, in the keeping of its guardian. It need not be in the physical possession of the guardian, but it must be under a continuous control, which is for the first time terminated by the act complained of. If a girl goes out into the street, or into a field by herself, with the intention of returning, she is still in the legal possession of her parent.[2] On the other hand, where a girl ran away from her home from ill-treatment, and met the prisoner, with whom she made an engagement, duly registered before the magistrate, to serve as a cooly, a conviction under s. 361 was set aside. Glover, J., said: "Was the girl then under her father's guardianship, when she fell in with the prisoner? I think not; she had voluntarily abandoned her home, and was running away. She was fourteen years of age, and not therefore of such tender age as to lead to the supposition that she had strayed from home, and was to all appearance a free agent. She, when taken before the magistrate, asserted that her parents were dead, and that she was going with her mother-in-law to Sylhet."[3] And so a conviction was held bad, where the indictment charged that a girl was enticed from the possession of her mother, the fact being that her mother refused to allow the daughter to live with her, but sent her to reside with her grandmother, under whose care she supposed the girl to be.[4] Possibly, under the Code, the grandmother might have been alleged to be the lawful guardian. If a minor is in service, away from her own home, the charge should state that she was taken away from the lawful charge of her employer, not of her parents.[5]

§ 452. **Taking or Enticing.**—(3) In order to constitute a taking or enticing under this section, the consent of

[1] MacN. M.L. 267—269; *in re Taybeb Ally*, 2 Hyde, 63; *Raj Begum* v. *Resa Hossein*, 2 Suth. Civ. 76; *Hamid Ali* v. *Imtiazan*, 2 All. 72.

[2] *Per* Brett, J., L.R., 2 C.C., at p. 168; *Reg.* v. *Mycock*, 12 Cox, 28; *Reg.* v. *Mt. Ouzeerun*, 7 Suth. Cr. 98.

[3] *Reg.* v. *Gunder Singh*, 4 Suth. Cr. 6.

[4] *Reg.* v. *Burrell*, L. & C. 354; S.C. 32 L.J. M.C. 54.

[5] *Reg.* v. *Henkers*, 16 Cox, 257.

the minor is wholly immaterial, neither force nor fraud are required.[1] Nor is it necessary that there should be any intention to make an unlawful use of the minor. The offence consists in the violation of the rights of the guardian. Convictions have been maintained where a man carried off his betrothed wife, after the marriage had been broken off by her father;[2] where a Hindu wife carried off her daughter to be married, without the knowledge or consent of her husband;[3] and where a father carried away his daughter from her husband.[4] It is not necessary that the prisoner should be present when the minor quits its home with the intention of abandoning it;[5] but the influence of the prisoner must instigate, or co-operate with, the inclination of the minor at the time the final step is taken, for the purpose of causing it to be taken. Where the defendant went in the night to the house of the girl's father, and placed a ladder against the window, by which she descended and eloped with him, this was held to be a taking of her out of the possession of her father, though she had herself proposed the plan.[6] And so it was held where the girl left her home alone, by a preconcerted arrangement with the prisoner, and went to a place appointed, where she was met by him, and they then went off together without the intention of returning; since up to the moment of her meeting with the defendant she had not absolutely renounced her father's protection.[7] And it makes no difference that the girl has left her home before the prisoner wished her to do so, if, finding that she has left, he avails himself of her position to induce her to continue away from her lawful custody, provided she left her home under the influence of his previous persuasion. If, however, the girl leaves her home, without any persuasion or inducement held out to her by the prisoner, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to restore her to her home, yet his not doing so is no infringement of the law, for the statute does not say he shall restore her but only that he shall not take her away.[8]

[1] *Reg.* v. *Bhungee*, 2 Suth. Cr. 5; *Reg.* v. *Sooku*, 7 Suth. Cr. 36.
[2] *Reg.* v. *Gooroodoss*, 4 Suth. Cr. 7.
[3] *Reg.* v. *Prankrishna Surma*, 8 Cal. 969.
[4] *Re Dhuronidhur Ghose*, 17 Cal. 298.
[5] *Reg.* v. *Robb*, 4 F. & F. 59.
[6] *Reg.* v. *Robins*, 1 C. & K. 456.
[7] *Reg.* v. *Mankletow*, Dearsl. 159; S.C. 22 L.J. M.C. 115.
[8] *Reg.* v. *Olifier*, 10 Cox, 402.

Where there has been a taking within the section, it makes no difference that it was, and from the first was intended to be only temporary. In a case under the English statute, it appeared that the prisoner asked the girl to go out with him, to which she consented, and she remained away from her home with him for three days, visiting places of public entertainment by day and sleeping together by night. They then separated, he telling her to go home. The father of the girl swore that she went away without his knowledge and against his will. The girl went of her own wish, and the jury found that the prisoner had no intention of keeping her permanently away from her home. The conviction was affirmed. The Court said: "The statute was passed for the protection of parental rights. It is perfectly clear law that any disposition of the girl, or any consent or forwardness on her part, are immaterial on the question of the prisoner's liability under this section. The difficulty arises on the point whether the prisoner has taken her out of the possession of her father within the meaning of the statute. The prisoner took the girl from her father, from under his roof and away from his control, for three days and nights, and cohabited with her during that time, and placed her in a condition quite inconsistent with her being at the time in her father's possession. We think that in these facts there is enough to justify the jury in finding that he took her from the possession of her father, even though he intended her to return to him. The offence under this enactment may be complete almost at the instant when the girl passes the threshold of her father's house, as where the facts show that the man who takes her away has an intention of keeping her permanently. We do not mean to say that a person would be liable to an indictment, if the absence of the girl whom he takes away is intended to be temporary only, and capable of being explained, and not inconsistent with her being under the parental control. All we say is that there is in the present case sufficient evidence for the jury to act upon." [1]

§ 453. **Want of Consent.**—(4) In the absence of evidence to the contrary, it will be assumed that the taking was against the guardian's consent. If the defendant relies upon her consent he must prove it, or facts from which it may be inferred. Where the girl's mother had encouraged her to a loose course of life, by permitting her to go out alone at nights,

v. *Timmins*, 30 L.J. M.C. 15; S.C. Bell, 276.

and dance at public-houses, Cockburn, C.J., ruled that she could not be said to be taken away against the mother's will within the meaning of the statute.[1] The fair inference from the facts was that the mother had renounced all moral control over her daughter, and left her to follow her own inclinations. A very important question has been raised with reference to a case where a mother placed her daughter, less than sixteen years of age, under the care of a lady, who caused her own son to marry the girl without the mother's consent. This was held not to be an offence within 4 & 5 Ph. & M., cl. 8, s. 2, because the marriage was openly solemnized.[2] Sir Hyde East says: "It deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute. For, then, every schoolmistress might dispose in the same manner of the children committed to her care; though such delegation of the custody of a child for a particular purpose be no delegation of the power of disposing of her in marriage, but the governance of the child in that respect may still be said to rest with the parent."[3] I think there can be no doubt that if a schoolmistress were to connive at the elopement of one of her pupils with a man, he would be convicted under s. 361. She could have no authority to consent to such an act, and he could not have supposed that she had.

§ 454. As to the effect of ignorance of, or mistake as to the above facts, in *Prince's* case,[4] Bramwell, B., said: "If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in any one's possession, nor in the care or charge of any one. In these cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession and in care or charge of any one, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause." The latter branch of the above dictum was founded upon the ruling in *Reg.* v. *Hibbert.*[5] There the prisoner met a girl in the street going to school,

[1] *Reg.* v. *Primelt*, 1 F. & F. 50. [2] *Hicks* v. *Gore*, 3 Mod. 84.
[3] 1 East, P.C. 457. [4] L.R., 2 C.C., at p. 175. [5] L.R., 1 C.C. 184.

and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he met her. The girl then went to her home where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met the prisoner. He made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to believe and did not believe that she was a girl of the town. The decision in this case turned upon the absence of any circumstances to show that the prisoner had knowledge that he was taking the girl from the possession of those who lawfully had charge of her. In the absence of any finding of fact upon that point, the Court said that the conviction could not be supported.

In this case, and in an earlier case which it followed,[1] it did not appear that the prisoner believed or imagined that the girl was not under lawful guardianship, but only that he did not concern himself to have any opinion on the matter. If the same case occurred in India, the prisoner could certainly not protect himself under s. 79. In a very similar case in Bombay, where, however, the girl was much younger, the conviction was affirmed. The Court was of opinion "that the fact of the accused not inquiring at the time of removing a child ten years of age, from lawful guardianship, whether she had a guardian or not, is no excuse; for by not inquiring, the accused takes the risk on himself, and cannot escape its legal consequences. A child of such tender age is, *primâ facie*, subject to guardianship, and no one is at liberty to take away such child without permission properly obtained. The objective fact of the child being in the keeping of a guardian, satisfies in this respect the requirements of this section of the Code."[2] In this country, where every girl under sixteen, not being a prostitute, is under legal guardianship, it would seem that any one charged with an offence under s. 361 must establish, that he had good reason to believe, either that the minor was not under guardianship, or that he had secured the guardian's consent to her act.[3]

§ 455. The offences defined by ss. 360 and 361 are continuing offences, and may, therefore, be abetted as long as the process of taking the minor out of the keeping of her

[1] *Reg.* v. *Green*, 3 F. & F. 274. [2] *Reg.* v. *Umsadbaksh*, 3 Bom. 178.
[3] See *Reg.* v. *Gunder Singh*, 4 Suth. Cr. 6; *ante*, § 451.

lawful guardian continues.[1] A subject of an Independent State who commits the offence of kidnapping or abduction from British India is amenable to the British courts for that offence, and if it is committed with the intention of murdering, or endangering the life of that person, he would be liable to the additional penalties of s. 364. If, however, the person so kidnapped or abducted was actually murdered beyond our territories, there could be no jurisdiction in respect of the homicide.[2]

§ 456. **Abduction,** under s. 362, requires the element of force or fraud, which is absent from kidnapping. The offence is against the person abducted, and it may be committed against a person of any age. The force or deceit specified in this section must operate upon the person who is abducted, not upon any other person, whose consent is necessary in order to get possession of such person. A prisoner was indicted under the English statute, 24 & 25 Vict., c. 100, s. 56, which renders it an offence "unlawfully, either by force or fraud, to take away a child." It appeared that the boy, being anxious to get away from school, arranged with the prisoner, that the latter should write to him as if he were the boy's uncle, stating that he was coming to see him. The prisoner did so, and then called at the school, and by representing that he was the boy's uncle, obtained leave to take him away for the day. He took him away, but did not return him to school. It was held that the offence created by the statute had not been committed. No force or fraud had been exercised upon the boy, and the prisoner had merely assisted him in carrying out a fraud upon his master.[3] If, however, such a fraud were practised upon any person who had the charge of another, and if that other went with the fraudulent party, believing that he was what he represented himself to be, that, I imagine, would bring the case within either the English statute, or s. 362 of the Indian Penal Code, though the person taken away exercised no independent volition in the matter.

§ 457. Where a woman is either kidnapped or abducted, with intent that she may be compelled, or with the knowledge that it is likely she will be compelled, to marry any person against her will, or in order that she may be, or with

[1] *Reg.* v. *Sumia Kaundan*, 1 Mad. 173.
[2] *Reg.* v. *Dhurmonarain*, 1 Suth. Cr. 30.
[3] *Reg.* v. *Birrell*, 15 Cox, 658.

the knowledge that it is likely that she will be, forced or seduced to illicit intercourse, the offender is punishable under s. 366.

This section seems to apply to cases where, at the time of the abduction, the woman has no intention of marriage or illicit intercourse, but it is contemplated that her marriage, or illicit intercourse with her, will be accomplished by force or seduction, brought to bear upon her afterwards. Section 498 embraces all cases where the object of the taking, or enticing, is that the wife may have illicit intercourse with some other person, even though, as generally happens, she is quite aware of the purpose for which she is quitting her husband, and is an assenting party to it. Therefore, where a procuress induced a married woman of twenty to leave her husband, and the facts showed that "she had made her deliberate choice, and was determined of her own free will to leave her husband, and become a prostitute in Calcutta," the Bengal High Court held that no conviction could be maintained under s. 366; but that there was quite sufficient evidence to convict the prisoner of enticing, under s. 498, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interfered."[1]

Where the husband is the complainant in a charge preferred under s. 366, the Court is authorized, by s. 238 of the Crim. P.C., to convict of the minor offence under s. 498, if the facts show that the special intention required by s. 366 is wanting. His complaint under one section of the Code, in cases connected with marriage, is sufficient authority, under s. 199 of the Crim. P.C., to justify the Court in dealing with the case under an analogous section.[2]

As s. 366 is merely an aggravated form of the offence under s. 363, the same person cannot be convicted on the same facts upon charges framed under both sections.[3]

§ 458. Any person who wrongfully conceals or keeps in confinement a person whom he knows to have been kidnapped or abducted, commits an offence under s. 368, and is punishable as if he had himself kidnapped or abducted the person, with the same intention, knowledge, or purpose with which he detains or conceals such person. That is, he may be

[1] *Reg.* v. *Srimotee Poddee*, 1 Suth. Cr. 45.
[2] *Jutra Shekh* v. *Reasat Shekh*, 20 Cal. 483.
[3] *Reg.* v. *Isru Panday*, 7 Suth. Cr. 56.

punished under any one of ss. 363—367, or 369, according to the facts of the case. The mere keeping in a man's house of a girl whom he knows to have been kidnapped or abducted, is not an offence under this section, though it might be strong evidence of abetment of the principal offender. It is necessary to show that he has restrained her liberty of movement, or kept her out of view of those who might be in search of her.[1] This section refers to those who assist the kidnappers, not to the kidnappers themselves.[2]

§ 459. **Slave dealing.**—One of the intentions specified in s. 367 is that of subjecting the person kidnapped or abducted to slavery, or the danger of it. Section 370 renders penal isolated cases of dealing in slaves, either by way of procuring, disposing of, or receiving them, while s. 371 imposes an increased punishment upon those who habitually practice such offences.

A difficulty has been thought to arise under the latter section, inasmuch as they assume the possibility of a state of slavery still existing in India, notwithstanding what is called the Abolition of Slavery Act, V. of 1843. This is clearly the case as regards some of the offences created by the section, though others, such as exporting, removing, selling, or disposing of a person as a slave might be completed in India by a person who sold another into slavery in Turkey or Arabia. In the case of *Reg.* v. *Mirza Sikunder*,[3] a Hindu girl was kidnapped and sold to a Mohammedan, who made her a Musulmani, changed her name, and kept her for four years in menial service, giving her food and clothes but no wages, and not allowing her to leave the house. He was convicted under s. 370. The Court said: "It is urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour, and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor."

In a later case,[4] a person was convicted under this section for having sold a young girl to another with the intent that

[1] *Reg.* v. *Jhurrup*, 5 N.W.P. 133; *Reg.* v. *Mt. Chatooa*, *ibid.* 189.
[2] *Reg.* v. *Sheikh Oozeer*, 6 Suth. Cr. 17. [3] 3 N.W.P. 146.
[4] *Empress* v. *Ramkuar*, 2 All. 723.

for another, that is an offence under s. 374; but if, having from other motives entered into a voluntary service, he is beaten to keep him up to his work, it being open to him to give it up whenever he likes, only the offence created by s. 352 has been committed. Amends cannot be awarded in or under this section.[1]

§ 461. **Dealing in Prostitution.**—Sections 372 and 373 render it criminal to deal in minors under the age of sixteen years, with the intent that any such minor shall be employed or used for the purpose of prostitution, or for any unlawful or immoral purpose, or knowing it to be likely that such minor shall be so employed or used. The former section applies to the person who sells, lets to hire, or otherwise disposes of the minor; and the latter, to the person who buys, hires, or otherwise obtains possession of the minor. In the great majority of cases these offences will be committed in respect of girls, but they would equally apply to boys, who are intended for the gratification of unnatural lusts. They would also apply in cases where no sexual object was in view, if the minor was intended to be trained up for any criminal career, as theft, burglary, murder, or the like. If the scene of "Oliver Twist" had been laid in India, Fagin might have been indicted under s. 373. The fact that the person who disposes of the minor commits an illegal act in so doing does not bring him within s. 372, if the minor is intended to be employed for an innocent purpose. Where the prisoners, by falsely representing that girls of whom they had obtained possession were Rajpoots, palmed them off as wives upon members of that caste, and obtained money for them as such, the prisoners committed the offence of cheating under s. 417, but it were not punishable under s. 379.[2]

§ 462. These sections were very much considered in the case of *Reg.* v. *Shaik Ali*.[3] There, the charge was under s. 373. It appeared that the prisoner by an offer of money induced a girl of the age of ten years to have a single act of sexual intercourse with him in an uninhabited house, to which she went at his request for the purpose. Both parties were surprised in the act, and the man was at once taken into custody. The judges, upon a case referred by Scotland, C.J., were of opinion that the conviction was bad. In the first

they were all of opinion that the prisoner had never obtained possession of the girl within the meaning of this section. Scotland, C.J., said: "But, to bring a case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not. Complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the knowledge or intent that, by the effect of such possession or control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that an obtaining of possession, in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the mind of the framers of the section."

On a second point there was a difference of opinion. The Chief Justice said: "It is not, I think, essential to the offence that the buying, hiring, or other obtaining of the possession of the minor should be from a third person; the language of the section is quite applicable to an agreement or understanding come to with the minor without the intervention of a third person, and the vice against which the section is directed is certainly not of any lesser enormity in the latter case."

On the other hand, Holloway, J., was of opinion that it must be a transaction "of which other parties are the subjects and the minor is the object." "This view need afford no encouragement to the debauching or seduction of innocent girls without the consent of their guardians; such cases are fully provided for elsewhere, and the fact that they are so, removes all doubt from my mind as to the construction of the present section."

On a third point, Holloway, J., said: "I must guard myself against being supposed to think that nothing more is required than minority, a contract, and an intent to have sexual connection, to render the man who hires punishable under this section. The intention or knowledge must be made out, and it may well be, looking at the whole scope of the sections, that the previous ones deal with the corrup-

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[1] *Reg.* v. *Phokondu*, 5 Suth. Cr. 1.
[2] *Reg.* v. *Dabee Singh*, 7 Suth. Cr. 55; *Reg.* v. *Sri Lall*, 2 All. 694.
[3] 5 Mad. H.C. 473.

they were all of opinion that the prisoner had never obtained possession of the girl within the meaning of this section. Scotland, C.J., said: "But, to bring a case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not. Complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the knowledge or intent that, by the effect of such possession or control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that an obtaining of possession, in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the mind of the framers of the section."

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women by suppressing their will by force or deceit, and that these deal with the case of trafficking in innocence. They are, perhaps, not intended by confounding the provinces of law and ethics to make men virtuous by legislative enactment. A minor, not generally unchaste, may still be protected by its provisions; while she, who has been already devoted to prostitution, may not be within the protection, because, on any reasonable construction of the words, an unchaste act cannot have been committed with intent to do that which has already been done."

A similar decision was given upon the principal point in the N.W. Provinces. There the prisoner was convicted of attempting to commit an offence under s. 373, the evidence being that he had written to a girl under eleven to induce her to make an assignation with him for immoral purposes. The prisoner was an associate of prostitutes, but his letter showed no wish that she should become one. The Court held that the conviction was bad.[1] A similar decision was given in Calcutta under s. 372. There the defendants had handed over a girl of about eleven to a man who professed to want her for a single occasion, and received from him Rs. 5, which they said was the charge if the girl was kept for a short time. The Court, following the Madras decision, held "that the commission of an immoral act of sexual intercourse at an interview so brought about was not in the contemplation of the section," and dismissed the charge under s. 273 of the Crim. P.C. In the particular case, the girl was already a prostitute, a fact which might, if the circumstances had been different, have raised the point suggested by Mr. Justice Holloway, as to whether the two sections were not limited to "trafficking in innocence."[2]

§ 463. In a case where one defendant was charged under s. 372 with disposing of a minor for prostitution, and another was charged under s. 373 with obtaining possession of her for the same purpose, and also under s. 372 with letting her out for hire, this curious state of facts appeared. A Mohammedan married woman, under sixteen, who generally lived with her grandmother Nourjan, formed an adulterous intrigue with two Hindus, who, in order to facilitate their intercourse with her, persuaded her to become a prostitute. The grandmother assented to the arrangement, and the two proceeded a distant village, where they took up their residence with

[1] *Reg.* v. *Mt. Bhutia*, 7 N.W.P. 295.
[2] *Reg.* v. *Sukee Raur*, 21 Cal. 97.

a woman Jaggat Tara, where the girl received men who were introduced to her by Jaggat Tara. The latter took all money that was paid to the girl, and in return boarded and lodged her and her grandmother. On these facts Nourjan was convicted under s. 372, and Jaggat Tara under ss. 372 and 373. Glover, J., considered that the convictions were right. Louis Jackson, J., whose opinion apparently prevailed, thought both convictions should be annulled, on the ground that the daughter was a free agent and the moving party in the whole business. Nourjan had not disposed of her for prostitution. At the outside she had helped her in so disposing of herself. Jaggat Tara had not obtained possession of her under s. 373, but had received her for the girl's own purposes. Nor had she let the girl out for hire under s. 373, but had merely, by what Jackson, J., described as "a common arrangement enough," fed and clothed her, in consideration of receiving the wages of her prostitution.[1]

§ 464. To constitute an offence under s. 372, it is not necessary that there should have been a disposal equivalent to a transfer of possession or control over the minor's person; the mere fact of enrolling a minor among the dancing girls of a pagoda, whose profession is admittedly that of prostitution, is sufficient to constitute the offence.[2] Where such an enrolment is only provisional, and not final, the offence may, perhaps, not be made out.[3] The giving or taking in adoption of a minor to be a dancing girl is an offence under ss. 372 and 373, if the intention that she shall be a prostitute is made out. It is not an offence for a dancing girl to adopt a daughter, if her intention is that the girl should be brought up as a daughter, and that then she should be at liberty either to marry or to follow the profession of her prostitute mother.[4] Where the criminal intention is established, it is immaterial that the age of the girl is such that it cannot be carried out for many years.[5]

§ 465. **Rape.**—Under s. 375 "a man is said to commit 'rape' who, except in the case hereinafter excepted, has

[1] *Reg.* v. *Nourjan*, 6 B.L.R. Appx. 34; S.C. 14 Suth. Cr. 39.

[2] *Reg.* v. *Jaili*, 6 Bom. H.C. Cr. 60; *Reg.* v. *Padmaoati*, 5 Mad. H.C. 415; *Reg.* v. *Arnachellum*, 1 Mad. 164; *Srinivasa* v. *Annasami*, 15 Mad. 41; *Reg.* v. *Basava*, *ibid.* 75; *Reg.* v. *Tippa*, 16 Bom. 737.

[3] See *per* Parker, J., *Srinavasa* v. *Annasami*, 15 Mad. 313, at p. 329.

[4] *Reg.* v. *Ramanna*, 12 Mad. 273.

[5] *Deputy Legal Remembrancer* v. *Raruna*, 22 Cal. 164. See the same case as to the onus of proof of intention.

sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man, to whom she is, or believes herself to be, lawfully married.

Fifthly.—With or without her consent, when she is under twelve years of age.[1]

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape."[2]

The essence of the offence of rape consists in the act being committed against the will of the woman, or without her consent. These conditions of mind are quite distinct. An act is done against a woman's will when she knows what is being done, and objects or resists. An act is done without her consent[3] when from any cause she is incapable of knowing what is being done, or supposes that something different is being done, or, being aware of the nature of the act, supposes that it is being done under circumstances which make it an innocent act.

§ 466. As to the first class of cases, "it is no mitigation of this offence that the woman at last yielded to the violence, if such her consent were forced by fear of death, or of hurt. Nor is it any excuse for the party indicted that the woman consented after the fact; nor that she was a common strumpet; for she is still under the protection of the law, and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment."[4] Nor is the mere cessation of a genuine resistance evidence of consent.[5] All these circumstances, however, may be very

[1] Act X. of 1891, s. 1. [2] Act X. of 1891, s. 2.
[3] As to what is Consent, see s. 90; and *ante*, §§ 194, 195.
[4] 1 East. P.C. 444; 1 Hale, P.C. 628; 1 Hawk. P.C. 122.

material in considering the question, whether the woman was really forced or not. It must also be remembered that whatever a woman's actual state of mind may be, a man does not commit rape unless his act is done with the knowledge that the woman does not consent, and with the intention to effect it, notwithstanding her want of consent. "There may be cases in which a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does." [1] Don Juan could not have been convicted of a rape, when Donna Julia, "whispering, I will ne'er consent, consented."

§ 467. As regards the second class of cases, the law was laid down in England, that where a woman was so absolutely imbecile as to be unconscious of the nature of the act attempted, the offence was rape; but that if she understood it in the same way that an animal does, and consented to it from animal instinct, there was no rape.[2] Even in the latter case the act is now made a misdemeanour by 48 & 49 Vict., c. 69, s. 5. Under the Code, however, by s. 90, consent is not sufficient, if given by a person who from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives consent. Many lunatics possess quite this amount of understanding. No idiot does. If a man by drugs or by liquor, renders a woman incapable of knowing what she is about, and takes advantage of her condition to have connection with her, this is as much rape as if he had knocked her down and rendered her senseless.[3] And it would be just the same if he found her in that condition, and then availed himself of it, or took advantage of her when she was asleep.[4] So it was held to be rape when a man violated a girl, who supposed that she

[1] *Per* Denman, J., *Reg.* v. *Flattery*, 2 Q.B.D. 410. And the law was so laid down, in charging the jury, by Honyman, J., *Reg.* v. *Barratt*, L.R., 2 C.C. 81.

[2] *Reg.* v. *Fletcher*, Bell, 63; S.C. 28 L.J. M.C. 85; *Reg.* v. *Fletcher*, L.R., 1 C.C. 39; *Reg.* v. *Barratt*, L.R., 2 C.C. 81.

[3] *Reg.* v. *Camplin*, 1 Den. C.C. 89.

[4] *Reg.* v. *Mayers*, 12 Cox, 311. Some cases are recorded by Dr. Taylor in which rapes were alleged to have been committed on women while asleep. In one, the prisoner was convicted; in another, he was acquitted on the ground, which is no longer law, that such an act was not rape. It is obvious, as Dr. Taylor remarks, that where the sleep was not produced by artificial means, or of a lethargic character, the assertion should be received with extreme suspicion. Its truth is only possible in the case of a woman who was accustomed to sexual intercourse (Taylor, Med. Jur. ii. 446).

was submitting to a surgical operation.[1] The case of a woman who consents under the belief that the man is her husband, is expressly declared by the Code to be rape. A contrary decision in England, which had met with strong disapproval in *Reg.* v. *Flattery*, was finally overruled by statute in 1885.[2] Finally, no consent is sufficient when it is given by a mere child. The earliest age at which a girl could consent to intercourse so as to prevent the act being rape, was originally fixed by the Code, in conformity with English law, at ten. By Act X. of 1891, s. 1, the age has now been raised to twelve, so that cases of rape are no longer an exception to the general rule as to consent laid down by s. 90.

A similar change in the Code has been made by s. 2 of Act X. of 1891, in the exception to s. 375, which now makes twelve the earliest period for conjugal intercourse. After that age, of course, a husband cannot be guilty of a rape upon his wife. He may, however, be guilty of abetting others to commit the offence, and if he is actually present, assisting in the crime, he will be a principal, and not merely an abettor. Except that such cases have actually occurred, one would suppose them to be impossible.[3]

§ 468. Some degree of penetration is necessary to complete the offence of rape, but the smallest amount is sufficient, even though the *hymen* remains intact.[4]

By the English law there is an invincible presumption as to the impossibility of a rape being committed by a boy under fourteen. He may, however, be convicted of abetting the crime when committed by others, or of an indecent assault under s. 354.[5] It has been decided in England that he cannot be convicted of an assault with intent to commit a rape,[6] and in the case of *Williams*, cited above, Lord Coleridge, C.J., held that he could not be convicted of an attempt to commit a rape, that is, to do what the law said he was physically incapable of doing. Hawkins and Cave, JJ., intimated that in their opinion he could be convicted. The recent current of authorities in reference

[1] *Reg.* v. *Flattery*, 2 Q.B.D. 410.
[2] *Reg.* v. *Barrow*, L.R., 1 C.C. 156; 45 & 46 Vict., c. 69, s. 4.
[3] 1 Hale, P.C. 629; case of *Lord Castlehaven*, 3 St. Tri., p. 401.
[4] *Reg.* v. *Hughes*, 2 Moody, 190; *Reg.* v. *Lines*, 1 C. & K. 393.
[5] 1 Hale, 630; *Reg.* v. *Waite* (1892), 2 Q.B. 600; *Reg.* v. *William* (1893), 1 Q.B. 320.

to attempts (see *post*, § 682) renders it probable that the later view would prevail whenever it became necessary to decide the case. Some of the courts in America have held that in cases of this sort against boys under fourteen, physical capacity should be treated as a matter capable of proof, and to be proved, independently of any arbitrary presumption.[1] I am not aware of any Indian decision under the Penal Code. In an earlier case under the old law, where a boy only ten years old was convicted by the Futwah of rape upon a girl only three years old, the Court of Nizamut Adalat viewed it as an attempt only, and punished it as a misdemeanour with one year's imprisonment.[2] Dr. Chevers cited from the Nizamat Adalat Reports a case of a boy of thirteen or fourteen who was convicted of rape, and another of the same age, who was convicted of an attempt, it being doubtful whether he had consummated the crime. It must, however, be remembered that statements as to the age of natives must be accepted with great caution. Dr. Chevers mentions two cases of boys who were tried or convicted of rape, who alleged themselves to be twelve and eleven years of age, though in the opinion of the Court they were above fourteen.[3]

§ 469. Where the offence of rape is incomplete for want of penetration, the prisoner may be convicted of an attempt to commit a rape under Crim. P.C., s. 238. In order, however, to justify such a conviction, it must be shown that the prisoner was attempting something which would have been rape, if it had succeeded. It is not sufficient to show an indecent assault with intent to have illicit connection. The Court must "be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance."[4] If, however, a man attempts to get possession of a woman who is imbecile, or unconscious, or who is deceived as to the nature of the act, or the character of the person, no force is used or contemplated; and yet the attempt, if successful, would be rape, and, if unsuccessful, would be an attempt to commit a rape. This was so held by Lush, J., as regards the act of a man who attempted to have connection with a woman

[1] 1 Bishop, s. 466.
[2] *Kureem* v. *Meeun*, 1 M. Dig. 176, s. 513.
[3] Chevers, Med. Jur., pp. 674, 675.
[4] *Reg.* v. *Shanker*, 5 Bom. 403; see *per* Coleridge, J., *Reg.* v. *Stanton*, 1 C. & K. 415.

whom he knew to be asleep.[1] The language of Coleridge, J., in *Reg.* v. *Stanton*, cited above, which was used in reference to the case of a man who was attempting to have connection with a woman under the pretence of applying a medical remedy, seems to have been incorrect as regards its application to the particular facts.

§ 470. There is probably no accusation which requires to be watched with more caution than a charge of rape. As Lord Hale says, "It is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." He mentions a case which was tried before himself, in which a wealthy old man of about sixty-three was indicted for a rape, which was fully proved against him by a young girl of fourteen years old, and a concurrent testimony of her mother and father, and some other relations. When it came to the defence, in which in those days the prisoner had not the assistance of counsel, he afforded ocular demonstration to the jury that he was physically incapable, by displaying a rupture, which, as Lord Hale says, was "full as big as the crown of a hat."[2] Probably it alone stood between him and the gallows. Such charges are often made for revenge, often for extortion, and still more often to shield a reputation which has been voluntarily endangered. On the other hand, among the lower classes such offences are very common, and are effected with most revolting brutality. It is not *a priori* improbable that the accusation should be either true or false. The surrounding circumstances are even more important than the direct testimony.

§ 471. **Evidence.**—In the majority of cases, the only direct evidence of the rape is that of the prosecutrix herself. Where this breaks down, or cannot be obtained, as where the female from extreme youth, or from some incapacity, such as being deaf and dumb, cannot give her testimony, and there is no other evidence producible,[3] there is nothing for it but to acquit. Her evidence should always be received, not with distrust, but with caution. The first thing necessary to examine in support of her statement is, whether there is any indirect evidence that sexual connection took place. Upon this point it is most important to have the evidence of a medical man as to the state of the parts.

[1] *Reg.* v. *Mayers*, 12 Cox, 311. [2] 1 Hale, P.C. 635.
[3] See *Reg.* v. *Whitehead*, L.R., 1 C.C. 3

In India such evidence is often unattainable, but it would certainly be a suspicious circumstance if no female relation were produced to testify to marks of injury or the like. The next thing is to see, whether the connection, if it took place, was against her will. For this purpose all the surrounding circumstances should be carefully sifted. The character of the prosecutrix, her intimacy with the prisoner, and the amount of familiarity which she had formerly permitted him to indulge in; the place in which the act took place, as showing that she might have obtained assistance; the distance at which other persons were passing by; any screams or cries which were heard; her conduct immediately after the outrage, her appearance, and so forth.[1]

§ 472. The most important point for inquiry in these cases is the character of the prosecutrix. She may be a prostitute, or of such loose character as to fall little short of being such. She may have previously had improper relations with the accused, or with some other man or men other than the accused, or she may be of perfectly unblemished character. It is evident that the last supposition raises a very high degree of improbability as to the woman's consent being given to the act. In general, the character of a witness is assumed to be good, unless it is impeached by cross-examination. In case of rape, however, the character of the prosecutrix is so directly relevant to the charge which she is making, that it becomes of itself a relevant fact within the meaning of s. 11, cl. 2, of the Indian Evidence Act. Evidence that no suspicion of impropriety had ever fallen upon her would certainly be admissible for the prosecution, though if she were not cross-examined upon the point it would hardly be necessary. On the other hand, where a woman's chastity is admittedly tainted, the degree of taint will affect her evidence in very different ways. If she was of such loose character as to be open to the approaches of any one, or if she was living on terms of improper intimacy with the accused, the charge of rape becomes not impossible, but, to the last degree, improbable. Where, however, it is merely shown that a woman has had one or more clandestine intrigues, this raises no presumption that she would yield to any one who presented himself, and hardly any that she would yield to any particular man. Accordingly, in two

[1] See 1 Hale, P.C. 633, 636.

recent cases, where the question was raised for solemn decision in England, it was laid down that, in cases of rape, attempt to rape, or indecent assault, the prosecutrix could be cross-examined as to facts relating to her chastity; that if it was imputed to her that she was a prostitute, or woman of generally loose character, or that she had had connection with the prisoner himself, and if she denied it, distinct evidence to contradict her might be called for the defence.[1] If, however, she was asked as to previous intimacy with other men, and she denied it, her statement was final, and could not be contradicted. The distinction taken was, that in the two former cases the fact suggested went directly to the point in issue. In the last, it had only a very remote bearing, if any, upon that issue, and if rebutting evidence was admitted, the woman would be called upon to defend the whole of her previous life against charges of which she had no notice.[2] In some cases the courts have gone so far as to hold that a woman, when cross-examined as to particular facts relating to other men, might decline to answer.[3] The former decision, however, was doubted upon this point by Williams, J., in *Reg.* v. *Martin*,[4] and is opposed to the general principle that in all cases, civil and criminal, a witness may be cross-examined as to matters affecting character, though otherwise irrelevant, and is bound to answer, unless the answer might criminate himself.[5] This principle is affirmed by the Evidence Act, though the judge is given a controlling power, which prevents the monstrous abuse of the right of cross-examination which took place on the trial of the Tichborne claimant.[6]

§ 473. It was formerly held in England that evidence might be offered in a trial for rape and the cognate cases, that the prosecutrix had made a complaint immediately after the outrage, but that the particulars of the complaint could not be stated, nor the name of the person complained of. In two recent cases, however, judges of great experience refused to be bound by this practice, and laid down the more rational rule, that not only the fact that the prosecutrix made a complaint of rape, but everything which she stated

[1] See Evidence Act, I. of 1872, s. 155 [4].
[2] *Reg.* v. *Holmes*, L.R., 1 C.C. 334; *Reg.* v. *Riley*, 18 Q.B.D. 481.
[3] *R.* v. *Hodgson*, Russ. & Ry. 211; *Reg.* v. *Cockcroft*, 11 Cox, 410.
[4] 6 C. &. P. 562.
[5] *Cundell* v. *Pratt*, M. & M. 108; *Rex* v. *Yewin*, 2 Camp. 638.
[6] Act I. of 1872, ss. 146—148, 153.

immediately after the outrage as to its details, and as to the name of the offender, and what was said to her in reply, should be admitted in evidence.[1] This also is in accordance with the Indian Evidence Act, s. 8, illus. (*j*.).

§ 474. **Medical Evidence.**—In all cases of rape it is most important to have the skilled and unimpeachable evidence of a medical witness, who has examined the prosecutrix immediately after the alleged offence. Where many days have elapsed, such an examination is of little value. Dr. Taylor says: "The indications of rape, however well marked they may be in the first instance, either soon disappear or become obscure, especially in those women who have been already habituated to sexual intercourse. After two, three, or four days, unless there has been an unusual degree of violence, no traces of the crime may be found about the genital organs. In unmarried women and in children, when there has been much violence, the signs of rape may persist, and be apparent for a week, or longer." Casper records a case of undoubted rape committed on a child of eight years, the indications of which on the day following were undoubted. Eleven days after the assault the girl was again examined. The sexual organs were then in their natural state, and there was not the least appearance of local injury. As showing the caution which medical practitioners should observe in giving testimony in such cases, Dr. Taylor mentions an instance in which, on a charge of rape on a girl a little over seven years of age, the accused was committed for trial, solely on the evidence of the medical man who examined her six weeks after the alleged event, and swore that in his opinion she had been violated. At the trial the child admitted on cross-examination that the whole of her previous evidence was untrue, and the man was acquitted.[2] On the other hand, it is probable that acquittals have taken place improperly in many cases, on the supposition that marks of injury would have been found a short time afterwards, where none such appeared.

§ 475. The indications naturally to be looked for will vary according to the age of the sufferer. Dr. Taylor says: "With respect to marks of violence on the body of a child, these are seldom met with, because no resistance is commonly

[1] *Per* Byles, J., *Reg.* v. *Eyre*, 2 F. & F. 579; *per* Bramwell, L.J., *Reg.* v. *Wood*, 14 Cox, 46.

[2] Taylor, Med. Jur. ii. 448.

made by mere children. Bruises or contusions may, however, be found occasionally on the legs."[1] On the other hand, where a full-grown man has carried the offence upon a child beyond the minimum degree of penetration which brings him within the law, it is probable that he will cause injuries far exceeding the mere destruction of virginity, which are often evidenced by ruptures or lacerations of a dangerous or fatal character. It must, however, be remembered that while there may be a rape which has left the hymen intact, the absence of the hymen is not necessarily evidence of a rape, unless there is proof of its having been recently torn with violence. The hymen itself is sometimes congenitally deficient, or is destroyed by ulceration, or suppurative inflammation, a disease to which female infants of a scrofulous habit are subject.[2] Where distinct signs of violence are established, they are in the case of a child almost conclusive proofs of rape, as, except in some rare cases of precocious depravity, the consent of a child cannot be assumed, and if she is below twelve would be unavailing. The possibility of a false charge still remains. Dr. Chevers mentions a case of a procuress who, in revenge at the rejection of a child whom she had brought into the officers' quarters at Fort William, injured the girl's genitals, and then charged the officer with rape.[3]

Where the prosecutrix is a girl who has attained full maturity, and who was at the time of the offence a virgin, a rape carried out to the last degree would of course leave its trace on the female organs. Here the questions would be: first, was it clear that the girl had been violated; secondly, was there evidence of any degree of violence beyond what was consistent with her having consented to the act. Marks of injury on other parts of her person as showing resistance overcome by force, would of course be most material on the latter point.[4] On the other hand, the very ignorance of an innocent girl, coupled with the shock of an unexpected attack, may prevent any resistance until it is too late.

§ 476. In the case of a woman who is accustomed to sexual intercourse, it is quite a chance whether a rape will leave any marks of injury on the genitals. This depends on the mode in which the attack is made, and the time at

[1] Med. Jur. ii. 438.
[2] Taylor, Med. Jur. ii. 429—433.
[3] Chevers, Med. Jur. 701.
[4] Taylor, Med. Jur. ii. 439.

which her resistance is overcome. It is more likely that signs of violence will be found on other parts of her person, as it is to these that, if she resists at all, the first outburst of force will be applied. Some have even doubted whether it was possible to violate an adult woman of health and vigour against her will. Queen Elizabeth's illustration, when she handed a sword to a frail lady, and desired her to sheath it in a scabbard which was being constantly moved about, appears plausible, but is probably fallacious. When there is more than one assailant no woman has any chance. Nor where she is drugged, or intoxicated, or terrified into submission. But apart from such cases, as Dr. Taylor observes: "A rape may be committed on an adult woman, if she falls into a state of syncope, or is rendered powerless by terror and exhaustion. An eminent judicial authority has suggested that, in his opinion, too great distrust is commonly shown in reference to the amount of resistance offered by women of undoubted character. Inability to resist from terror, or from an overpowering feeling of helplessness, as well as horror at her situation, may lead a woman to succumb to the force of a ravisher, without offering that degree of resistance which is generally expected from a woman so situated. As a result of long experience, he thinks that injustice is often done to respectable women by the doctrine that resistance was not continued long enough." [1]

§ 477. In many cases where rape is falsely charged, advantage is taken of some peculiar condition of the female which gives plausibility to the charge. There are certain forms of purulent discharge from the female organ, resulting from inflamation of the vagina, or from *leucorrhœa*, which are sometimes supposed to be the result of rape, and sometimes are maliciously used as the pretext for accusing an innocent person. Sometimes this discharge destroys the hymen. Similar results follow from a malignant form of disease, known as *noma pudendi*, or destructive ulceration of the parts. All of these again are sometimes confounded with venereal infection, and ascribed to contact with a man who really has, or is supposed to suffer from such a disease. Here a triple medical question arises: first, whether the man had the species of disease which he is supposed to have communicated to the female; secondly, whether she really suffered from it; and thirdly, whether

[1] Taylor, Med. Jur. ii. 443—448; see Chevers, Med. Jur. 681, 702.

the time at which it appeared harmonizes with the event to which it is assigned.[1]

§ 478. The modern use of anæsthetics in surgery and dentistry has given rise to a new class of cases, in which the practitioners administering the narcotic have been charged with availing themselves of the condition of their patient, to do an act which the law considers to be rape. In some cases, it is to be hoped very few, the accused has been convicted of the offence. In others the charge has been proved either to be maliciously false, or made under the influence of mistake. Dr. Taylor says: "Anæsthetics stimulate the sexual functions, and the ano-genital region is the last to give up its sensitiveness. These charges are sometimes made in good faith by modest females. A woman under the partial influence of an anæsthetic may mistake the forcible attempts to restrain her movements, whilst she is passing through the preliminary stage of excitement induced by the anæsthetic, for an attempt upon her person. In one instance, a lady engaged to be married was accompanied to a dentist by her affianced husband. Chloroform was given, and a tooth extracted in the presence of this gentleman. She could hardly be convinced that the dentist had not made an attempt upon her chastity."[2]

It has been held in Calcutta, on a charge of rape, where the injured woman died of the violence used on the occasion, that her dying declarations were admissible in evidence, although there was no charge for culpable homicide against the prisoner.[3] The English rule would have excluded such evidence. It would seem to be receivable under the Indian Evidence Act, s. 32 (1).

[1] Taylor, Med. Jur. ii. 432—440; Chevers, Med. Jur. 679.
[2] Taylor, Med. Jur. ii. 444.
[3] *Reg.* v. *Bissorunjan*, 6 Suth. Cr. 75.

CHAPTER XI.

OFFENCES AGAINST PROPERTY.

§ 479. CHAPTER XVII. of the Code, which treats of offences against property, deals with three distinct classes of crime:

First, those which cause deprivation of property;

Secondly, those which cause mischief to property;

Thirdly, those in which the rights of property are violated with a view to the commission of some ulterior offence.

The first class is again subdivided, according to the nature and extent of the owner's [1] rights over the property at the time of the commission of the offence, as follows:—

I. When the owner has full possession and control of the property, if it is taken from him without his consent, it is theft; if he is compelled to part with it by violence or threats, it is robbery or extortion.

II. Where the owner's possession has accidentally ceased, it is misappropriation.

[1] The word "owner" in this paragraph means no more than the person who, as against the offender, is entitled to the possession of the property.

III. Where the owner has voluntarily given up the possession of the property, if the offence consists in a violation of the terms on which it is held, it is criminal breach of trust. If it consists in the fraudulent means by which the possession was obtained, it is cheating.

The various subdivisions of these three classes of crime will be discussed in the present chapter.

§ 480. **Theft.**—The elements of theft, as defined by s. 378, are: (1) movable property; (2) in the possession of any one; (3) a dishonest intention to take it out of that person's possession without his consent; and (4) a moving in order to such taking.

(1) *Movable Property* is defined by s. 2 as including "corporeal property of every description except land, and things attached to the earth, or permanently fastened to anything which is attached to the earth." It is expressly stated by Explanations 1 and 2 of s. 378, that things attached to the land may become movable property by severance from the earth, and that the act of severance will of itself be theft. This of course applies to everything growing or built upon the earth.[1] So it was held to be theft to gather salt spontaneously formed on the surface of a swamp appropriated by Government.[2] In a later case, the same court held that the rule laid down in s. 378 was limited to things attached to the earth, and did not apply to portions of the earth itself, when quarried and dug up by the persons who then carried them away. Kernan, J., distinguished the last case on the ground that the salt was not part of the earth, but a growth upon it.[3] The Bombay High Court, in an exactly similar case, refused to follow this decision.[4] Even according to English law, where the severance and the removal of things attached to the soil, such as trees, or the lead of a church, were not continuous, but separate acts, the final carrying away was larceny; and for this purpose a tree was exactly on the same footing as minerals in the soil.[5] The object of s. 378 appears to be to abolish this distinction, and to put the thief who severs and carries away, in exactly the same position as if he carried away what had previously been severed.

[1] 5 Mad. H.C. Rulings 36.
[2] *Reg.* v. *Tamma Ghantaya*, 4 Mad. 228.
[3] *Reg.* v. *Rotayya*, 10 Mad. 255.
[4] *Reg.* v. *Shivram*, 15 Bom. 702.
[5] *Reg.* v. *Townley*, L.R., 1 C.C. 315.

§ 481. The Code gives no colour to the idea, which was at the bottom of many distinctions in the English law of larceny, that the thing stolen must have some appreciable value of itself, and not merely as evidencing a right to something else.[1] Whatever a man has, it is a crime to steal from him. Where the article taken is utterly without value, so that the prosecution is frivolous or vexatious, an acquittal under s. 95 would be supported.[2] The article must, however, be something which can be the subject of property. It is laid down in the English law books, that there can be no property in a human body, whether living or dead, and, therefore, stealing a corpse is not larceny, though it was indictable as an offence against public decency.[3] Sir James Stephen says that this is the only movable object known to him which is incapable of being property, and suggests that anatomical specimens and the like would be personal property.[4] The contrary, however, was held by Chief Justice Willes, in a case of trover against *Dr. Handyside*, who had carried away the preserved bodies of two children which had grown together, and had been kept as a *lusus naturæ*.[5] I cannot think that such a decision would be given now, as it would authorize the wholesale plunder of a surgical museum. If the rule as to a corpse should be applied in India, the only punishment for such offences as were committed in stealing, after burial, the bodies of Mr. Stewart, the American millionaire, and of Lord Crawford, would be by framing a charge under s. 297. Where a testator had left directions in his will as to the disposal of his body, it was held that they were invalid, and Kay, J., said, "the law in this country is clear that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried."[6] Apparently, then, it would be theft to remove a corpse from the possession of a person who had charge of it for the purpose of burial. Shrouds and coffins are the subject of larceny, and are the property of the executors of the deceased, or of whoever buried him, but of the churchwardens, or of the persons in whom the

[1] 1 Hawk. P.C. 148; 2 East, 597.
[2] *Reg.* v. *Kasya*, 5 Bom. H.C. C.C. 35.
[3] 1 Hawk. P.C. 148, n.
[4] 3 Steph. Crim. L. 127.
[5] 1 Hawk. P.C. 148, n.
[6] *Williams* v. *Williams*, 20 Ch. D., p. 665.

property of the burying-ground is vested.[1] The difficulty under the Penal Code would probably be to assert that they were in the possession of any one. Water and gas in pipes is the property either of the persons by whom, or of the persons to whom the article is supplied, as the case may be.[2]

§ 482. **Possession.**—(2) The property which is alleged to be stolen must have been in the possession of some one at the time of the theft. It must therefore have been something of which a continuous possession is possible. There can be no theft of wild animals, or birds, or fish, while they are at large, even though they are on the property of the prosecutor, or on property where he has a right to capture them.[3] But it is otherwise where the creature is tame by nature or training, or is confined in some place where it may be taken at pleasure, as in a menagerie, or an enclosure, or a fish-pond, or is too young to escape from a place where it is under control, or is dead.[4] A domestic animal which strays upon a neighbour's ground, or upon a common, does not cease to be in the owner's possession.[5] A bull, which has been set at liberty by a Hindu, as part of a religious ceremony, is not the subject of theft, as its owner has abandoned his property in it, and it has not become the property of any one else.[6] A bull which, being dedicated to an idol, and accepted on behalf of the temple, is allowed to roam at large, does not become *res nullius*, but is the property of the trustees, who retain all the rights and obligations of ownership.[7] Where a man loses or mislays property in his own house, or upon his own premises, it still remains in his possession, and any one who finds the article is bound to assume that it belongs to the owner of the place where it is found. If he appropriates it to himself without making the proper inquiries, he commits theft.[8] The same

[1] 2 East, P.C. 652.

[2] *Ferens* v. *O'Brien*, 11 Q.B.D. 21; *Reg.* v. *White*, Dearsl. 203; S.C. 22 L.J. M.C. 123.

[3] 2 East, P.C. 607; *Bhusan* v. *Parui Denonath*, 20 W.R. Cr. 15; *Reg.* v. *Revu Pothadu*, 5 Mad. 390; *Bhagiram Dome* v. *Abar Dome*, 15 Cal. 388.

[4] 2 East, P.C. 607; *Reg.* v. *Shaik Adam*, 10 Bom. 193; *Mayaram Surma* v. *Nichala Katani*, 15 Cal. 402; *Reg.* v. *Shickle*, L.R., 1 C.C. 158; *Reg.* v. *Townley*, *ibid.* 315.

[5] 1 Hale, P.C. 506.

[6] *Reg.* v. *Bandha*, 8 All. 51; *Reg.* v. *Nipal*, 9 All. 348; *Romesh Chunder* v. *Hira Mondal*, 17 Cal. 852.

[7] *Reg.* v. *Nalla*, 11 Mad. 145.

[8] 1 Hale, P.C. 506; 2 East, P.C. 664; *Reg.* v. *Kerr*, 8 C. & P. 176.

principle applies to inanimate objects. If a man sends a coat to a tailor, in the pocket of which he has left his purse, or sends a table to a carpenter, in the drawer of which there is money, he retains both the property and the possession of the purse and money; and it makes no difference that he was not aware of the contents of the pocket or drawer, because he was entitled to have both coat and table back again, with everything which they contained. But if he had sold the coat or the table in ignorance of their contents, his property in the valuables would remain, but his possession would be lost. In the former case the offence would be theft; in the latter, misappropriation.[1] Where iron had dropped out of a canal boat, and was found and carried away when the water was drawn out of the canal, it was held that both the property and the possession of the Canal Company continued, and that the taking was theft.[2] But where a man buried the carcase of a bullock, suspecting it to have been poisoned, it was ruled that this showed an intention to abandon both property and possession, and that a person who dug up and carried away the carcase could not be convicted of theft.[3]

§ 483. Property still remains in the possession of the owner, where it is in the physical custody of some one to whom he had entrusted it for his own benefit, and from whom he can demand it unconditionally whenever he pleases. The particular cases of a person's wife, clerk, or servant, are mentioned specifically in s. 27 of the Code, but the same principle applies to all similar cases. The plate which is supplied for the use of a guest at a hotel; the goods which are placed in the hands of a customer at a shop, or left at his house for inspection; a horse at a livery stable, which a professing purchaser is allowed to mount, in order to try his paces, still remain in the possession of the owner.[4] So, where a lady who wanted a railway-ticket, handed the money to a stranger, who was nearer than herself to the ticket-office, that he might procure a ticket for her, and he ran away with the money, this was held to be theft, as she never parted with the dominion over the money, and merely used his hand in place of her own.[5] And if, as

[1] *Cartwright* v. *Green*, 8 Ves. 405; S.C. 2 Leach, 952; *Merry* v. *Green*, 7 M. & W. 623.

[2] *Reg.* v. *Rowe*, 28 L.J. M.C. 128; S.C. Bell, 93.

[3] 4 Mad. H.C. Rulings 30.

[4] 1 Hale, P.C. 506; 1 Hawk. P.C. 145; 2 East, P.C. 677, 687.

[5] *Reg.* v. *Thompson*, 32 L.J. M.C. 53; S.C. L. & C. 225.